Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

KENDALL H. BREEDLOVE,

Petitioner

v.

TYSONS MANOR HOMEOWNERS ASSOCIATION, *et al.*,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Kendall H. Breedlove, *pro se*
2831 Gallows Road
Suite 145
Falls Church, Virginia 22042

91 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is the Virginia property owners association lien law (*i.e., Virginia Code (1950),* as amended, *§55-514* through*§55-516*), *on its face*, constitutional: (a) when it fails to provide notice or opportunity to be heard or any other predeprivation provisions to safeguard the Due Process provisions of the Fourteenth Amendment of the U.S. Constitution and of Article I, §11, of the Virginia Constitution; and (b) when Virginia postdeprivational remedies for redress are inadequate?

2. Was the Petitioner denied procedural due process, or Equal Protection under law, by the dismissal decision, *itself*, of the Fourth Circuit court of appeals, affirming the district court's dismissal, not on a fair and substantive basis: (a) when the Fourth Circuit court of appeals failed to make the written determinations required by the U.S. Supreme Court's holding in *Coleman v. Thompson*, 501 U.S. 722, 115 L.Ed.2d 640, 111 S.Ct — (1991)—that the dismissal decision, *itself*, did not abridge any constitutional rights—and (b) when the Fourth Circuit court dismissed the instant appeal not on a fair and substantive basis, and without hearing the merits?

3. Was the Petitioner denied procedural due process, or Equal Protection under law, when the Fourth Circuit court of appeals disregarded the Court's duty, in violation of the holding of the U.S. Supreme Court in *Ward v. Board of County Comm'rs*, 253 U.S. 17, 64 L.Ed 751, 40 S.Ct 419 (1920), and renounced or neglected a jurisdiction conferred by law, after the Court possessed *in personam* jurisdiction as to all parties?

4. Was the Petitioner denied procedural due process, or Equal Protection under law, by the Fourth Circuit court of appeals' decision, *itself*, to deny the *Petition for Rehearing* and let stand the dismissal of the appeal, not on a fair and substantive basis, when the Fourth Circuit court of appeals: (a) failed *sua sponte* to make the written determinations required by the U.S. Supreme Court's holding in *Coleman v. Thompson*, *supra*, and (b) denied rehearing of the instant action, letting stand the dismissal decision, not on a fair and substantive basis, and without hearing the merits?

5. Was the Petitioner denied procedural due process, or Equal Protection under law, or Civil Trial by Jury, by the Fourth Circuit court of appeals failing to review and reverse the actions of the district trial court in the instant action, which trial court dismissed the instant action in its entirety, with prejudice: (a) without hearing on the merits; and (b) without necessary questions of fact being determined by a jury?

6. Was the Petitioner denied procedural due process, or Equal Protection under law, by the Fourth Circuit court of appeals April 4, 1995, *opinion* affirming the dismissal of the instant action, when the Fourth Circuit court of appeals: (a) failed *sua sponte* to discharge its mandatory duties under 28 USC §2403 (b) to certify the challange to the constitutionality of the Virginia property owners association lien law amd to notify the Attorney General of Virginia; (b) refused to discharge its mandatory 28 USC §2403 (b) duties when requested twice by written motion during the appeal and once by written motion during the *petition for rehearing*, denying the first two motions for 28 USC §2403 (b) certification in footnote of the April 4, 1995, *opinion*; and (c) failed to rule on or to enter dispositive order on Petitioner's April 26, 1995, motion for 28 USC §2403 (b) compliance?

7. Is the September 9, 1994, *dismissal order* of the federal district court void for lack of jurisdiction by the district trial judge to dismiss the instant suit: (a) after failing *sua sponte* to discharge the federal district court's mandatory 28 USC §2403 (b) duties to certify the challenge to the consttitutionality of one or more of Virginia's statutes and to notify the Attorney General of Virginia; (b) after failing to rule on Petitioner's question on September 9, 1994, in open court, as to whether it was proper for the court to hear the matter on that day, in that the Attorney General of Virginia had not been notified of the hearing, pursuant to 28 USC §2403 (b), and the constitutionality of a Virginia statute was being challenged; and (c) without hearing the merits of the challenge to the constitutionality of the Virginia property owners association lien law?

8. Are the April 4, 1995, *opinion* and the May 19, 1995, *order* of the Fourth Circuit court of appeals void for lack of jurisdiction by the circuit judges to dismiss the instant appeal:

(a) after failing, *sua sponte*, and refusing three times on written motion to discharge the Fourth Circuit court's mandatory 28 USC §2403 (b) duties; and (b) after failing to make the determinations required by *Coleman v. Thompson*, 501 U.S. 722, 115 L.Ed.2d 640, 111 S.Ct — (1991), that the dismissal decision, *itself*, not on a fair and substantive basis, does not abridge any constitutional rights?

9. Has Plaintiff Breedlove stated a cause of action under *42 USC §1983* in his *Amended Complaint*? Has Plaintiff properly alleged the four elements of a cause of action under 42 USC §1983: that (1) some person has deprived the plaintiff of a federal right; (2) the person who has deprived the plaintiff of that right acted under color of unconstitutional state or territorial law; (3) that state remedies are inadequate, attacking the state's corrective procedure as well as the substantive wrong; and (4) that the state law invoked by the Defendants with the assistance of state officials is unconstitutional?

10. Have the trial court and the Fourth Circuit court of appeals properly applied the ruling of what constitutes action "under color of state law," as defined by and set forth in *Lugar v. Edmondson Oil Co.*, 457 U.S., at 942, 73 L. Ed.2d., at 498, 102 S.Ct. 2744 (1982); *Folsom Investment Co., Inc. v. Moore*, 681 F.2d 1032, at 1037 (5th Cir., 1982); and *Lomax v. Davis*, 571 F.Supp. 805, at 807 (N.D. Miss., 1983)?

TABLE OF CONTENTS

Questions Presented For Review ..... *i*

Table of Contents ..... *iii*

Table of Authorities ..... *vii*

Petition for Writ of Certiorari *1*

Opinions Below *1*

Jurisdiction *2*

Notice Concerning 28 USC §2403 (b) *2*

Constitutional and Statutory Provisions Involved *3*

Statement of the Case *3*

Reasons For Granting the Writ *10*

I. The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law by violating the U.S. Supreme Court's holding in *Coleman v. Thompson, supra*, in three respects. 10

II. The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law by violating the holding of the U.S. Supreme Court in *Ward v. Board of County Comm'rs, supra*, by disregarding the Court's duty (neglecting or renouncing a jurisdiction conferred by law), after the Fourth Circuit court of appeals possessed *in personam* jurisdiction as to all parties, by general appearances and/or by notice comporting with due process and with 28 USC §2403 (b) 11

III. The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law: (1) by affirming improperly the lower court's failure to discharge its jurisdictional 28 USC §2403 (b) duties; (2) by itself failing, *sua sponte*, and by refusing (upon three written motions) to discharge its jurisdictional 28 USC §2403 (b) duties; and (3) by affirming the September 9, 1994, *dismissal order* of the lower court and by itself issuing the April 4, 1995, *opinion* and May 19, 1995, *order*, each of which three orders is void for lack of jurisdiction to dismiss 12

IV. The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law in failing *de novo* to hold that Petitioner had properly alleged a cause of action under 42 USC §1983, but rather affirming the lower court's dismissal for Petitioner's failure to state a cause of action.....18

V. Fourth Circuit court of appeals' decision to dismiss was arbitrary and capricious, without basis, or rationale, or legal authority to support it, ignored applicability of *Lugar v. Edmondson Oil Co., supra*, and ruled contrary to U. S. Supreme Court's holding therein 20

VI. The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law by failing to apply properly the rulings of what constitutes action "under color of state law," as defined by *Lugar v. Edmondson Oil Co., supra, Folsom Investment Co., Inc. v. Moore, supra,* and *Lomax v. Davis, supra* 26

Conclusion *28*

Appendix.....*1*

Exhibit 1 Unpublished April 4, 1995, *Opinion* of the Fourth Circuit Court of Appeals.....1

Exhibit 2 Unpublished May 19, 1995, *Order* of the Fourth Circuit Court of Appeals.....3

Exhibit 3 Factual Background and Course of Proceedings Before the Trial Court in the Instant Action.....4

Exhibit 4 Trial court September 9, 1994, *order* on motion to dismiss, appealed to Fourth Circuit court of appeals.....12

Exhibit 5 Paragraphs 16 – 20 of *Amended Complaint*.....13

Exhibit 6 Paragraphs 21 – 27 d of *Amended Complaint*.....15

Exhibit 7 Paragraphs 28 – 31 of *Amended Complaint*.....19

Exhibit 8 Paragraphs 32 – 32 c of *Amended Complaint*.....22

Exhibit 9 Excerpt from *transcript* of the oral proceedings of September 9, 1994, hearing, regarding "state action".....23

Exhibit 10 Excerpt from *Reply Brief for the Appellant*, showing comparison of Petitioner's allegations

in *Amended Complaint* with trial judge's September 9, 1994 verbal findings and ruling.....26

Exhibit 11 Application of Updated *Doehr*-version of the Three-part *Mathews* Test.....31

Exhibit 12 Virginia Property Owner Association lien law, *Virginia Code (1950), as amended, §55-514* through *§55-516*.....47

TABLE OF AUTHORITIES

CASES

Adickes v. S.H. Kress & Co., — U.S. 152, 26 L Ed 2d 142, 90 S Ct 1598 23
Broad River Power Co. v. South Carolina ex rel. Daniel, 281 US 537, 540, 74 L Ed 1023, 50 S.Ct 401 (1930) 12
Coleman v. Thompson, 501 U.S. 722, 115 L.Ed.2d 640, 111 S.Ct — (1991) ..... i, 2, 5, 6, 7, 10, 11, 12, 28, 30
Connecticut v. Doehr, 501 U.S. 1, 115 L.Ed.2d 1, 111 S.Ct 2105 (1991) 5, 15, 27, 29, A31, A33, A36, A37, A38, A39, A41, A46
Donohoe Constr. Corp. v. Mount Vernon Assoc., 235 Va. 531, 369 S.E.2d 857 (1988) A23
Eggleston v. Prince Edward Volunteer Rescue Squad, 569 F.Supp.1344 (E.D. Va., 1983) 26
Folsom Investment Co., Inc. v. Moore, 681 F.2d 1032 (5th Cir., 1982) ..... iii, v, 21, 25, 28, 30, A24
Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972) A31, A37, A43, A45
Gordon v. Leeke, 574 F.2d 1147, (4th Cir.), cert. denied, 439 U.S. 970 (1978) 17
Lomax v. Davis, 571 F.Supp. 805 (N.D. Miss., 1983) ..... iii, v, 25, 28, A25
Lugar v. Edmondson Oil Co., 457 U.S. 922, 73 L. Ed.2d. 482, 102 S.Ct. 2744 (1982) ..... iii, v, 7, 11, 20, 22, 23, 24, 25, 30 ..... A6, A7, A16, A17, A18, A19, A22, A26, A28
Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976) A31, A32, A33, A36, A41, A46
Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 77 L.Ed.2d 180, 103 S.Ct. 2706 (1983) 27
Merrill v. Addison, 763 F.2d 80 (C.A.2, N.Y., 1985) 15, 18
Mitchell v. W.T. Grant Co., 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974) A31
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 825, 94 L.Ed. 865, 70 S.Ct. 652 (1950) 27, A32
North Georgia Finishing v. Di-Chem, Inc., 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975) A31
Parratt v. Taylor, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct 1908 (1981) 11, 18, 19
Sniadach v. Family Finance Corp., 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969) A31
U.S. v. James Daniel Good Real Property, — U.S. —, — L.Ed.2d —, 114 S.Ct. 492 (1993) A37, A46
United States v. Price, 383 US, at 794, 16 L Ed 2d 267, 86 S Ct 1152 ..... 24, A18
Wallace v. Brumback, 177 Va. 36, 12 S.E.2d 801 (1941) 4, 21, A35, A42
Wallach v. Lieberman, 366 F.2d 254, 10 FR Serv 2d 747, 2 ALR Fed 969 (C.A.2, N.Y., 1966) 15, 18
Ward v. Board of County Comm'rs, 253 US 17, 23, 64 L Ed 751, 40 S Ct 419 (1920) ..... i, iv, 11
West v. Atkins, 487 U.S. 42, 101 L.Ed.2d 40, 108 S.Ct 2250 (1988) 11, 18, 19

STATUTES

28 USC §1254 2
28 USC §1291 10
28 USC §2403 (b) ..... ii, iii, iv, 1, 2, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 29, A1, A2, A10
42 USC §1983 ..... iii, v, 10, 11, 16, 18, 19, 20, 25, 29, A5,A6, A7, A8, A17, A18, A19,A22, A31, A36
Virginia Code (1950), as amended, §55-514 through §55-516 ..... vi, 2, 3, 15, 20, 25, 26, 29, A17, A19, A21, A22, A23, A32, A40, A41, A47
Virginia Code (1950), as amended, §55-516 ..... 13, 15, 16, 30

RULES

Fed. R. App. P. 3 ..... A11
Fed. R. App. P. 4 ..... A11
Fed. R. Civ. P. 12 (b) (6) A6, A7

CONSTITUTIONAL PROVISIONS

Article I, §11, Virginia Constitution ..... i, 3, 12, 13, 14, 21, 30
Fourteenth Amendment, U.S. Constitution ..... i, 3, 21, 23, A13, A14, A15, A17, A18, A19, A27, A28, A30, A32
Seventh Amendment, U.S. Constitution 3, 22

OTHER BREEDLOVE CASES

Ex Parte Kendall H. Breedlove, ex rel. Tysons Manor Homeowners Association v. Breedlove, ex rel. Sky Bryce Association, Inc. v. Breedlove, (E.D. Va., file no. CA-94-639-A, dism'd [unpubl.], 1995; C.A.4, no. 95-1737) 19, A31

IN THE
SUPREME COURT OF THE UNITED STATES

KENDALL H. BREEDLOVE,
Petitioner

v.

TYSONS MANOR HOMEOWNERS ASSOCIATION, *et al.*
Respondents[1]

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

Kendall H. Breedlove, the Petitioner in this appeal, respectfully prays that a *writ of certiorari* issue to review the judgments of the Fourth Circuit court of appeals, entered in the above-titled case on April 4, 1995, and May 19, 1995.

OPINIONS BELOW

1. The April 4, 1995, decision of the Fourth Circuit court of appeals dismissed Petitioner's *Brief for the Appellant.* This April 4, 1995, *opinion* is one of the decisions appealed herein to the U.S. Supreme Court and the April 4, 1995, *opinion* is reprinted as Appendix Exhibit 1, at pages A1-A2.

2. On its face, the April 4, 1995, *opinion* fails to set forth the written determinations required by the U.S. Supreme Court's holding in *Coleman v. Thompson*, 501 U.S. 722, 115 L.Ed.2d 640, 111 S.Ct — (1991), that the dismissal decision, *itself*, not on a fair and substantive basis, does not abridge any constitutional rights.

3. On its face, the April 4, 1995, *opinion* fails to set forth that the Fourth Circuit court of appeals discharged its mandatory, statutory duties under 28 USC §2403 (b), but rather denies the Petitioner's two motions for 28 USC §2403 (b) certification and notification in the footnote to the April 4, 1995, *opinion.*

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[1] The complete caption of the instant action is *Kendall H. Breedlove v. Tysons Manor Homeowners Association, and Charlotte M. Schow, in her capacity as Treasurer of the Tysons Manor Homeowners Association and in her individual capacity, and John Doe, other defendants unknown at present.*

4. The May 19, 1995, decision of the Fourth Circuit court of appeals denied Petitioner's *Petition for Rehearing*, dated April 14, 1995, This May 19, 1995, *order* is one of the decisions appealed herein to the U.S. Supreme Court and the May 19, 1995, *order* is reprinted as Appendix Exhibit 2, at page A3.

5. On its face, the May 19, 1995, *order* fails to set forth the written determinations required by the U.S. Supreme Court's holding in *Coleman v. Thompson*, *supra*, that the denial of the *Petition for Rehearing*, letting stand the April 4, 1995, dismissal decision, not on a fair and substantive basis, is a decision which, *itself*, does not abridge any constitutional rights.

6. On its face, the May 19, 1995, *order* fails to set forth that the Fourth Circuit court of appeals discharged its mandatory, statutory duties under 28 USC §2403 (b), *sua sponte*, and also fails to rule upon the Petitioner's (third) motion, dated April 26, 1995, for 28 USC §2403 (b) certification and notification invoked by the Petitioner's challenge to the constitutionality of the Virginia property owners association lien law, contained in the *Petition for Rehearing*.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fourth Circuit, denying Petitioner's *Petition for Rehearing*, dated April 14, 1995, was entered May 19, 1995. The jurisdiction of this Court is invoked pursuant to 28 USC §1254.

NOTICE CONCERNING 28 USC §2403 (b)

This Petition contains a challenge to the constitutionality of one or more of Virginia's statutes—the Virginia property owners association lien law, specifically *Virginia Code (1950)*, as amended, *§55-514* through *§55-516*—in an action in which no officer or representative of the State of Virginia is a named party defendant. As such, this *petition* invokes the mandatory procedures prescribed for federal courts by 28 USC §2403 (b), for the U.S. Supreme Court to certify the challenge to the constitutionality of one or more Virginia statutes and to notify the Attorney General of Virginia, which procedures are not subject to any judicial discretion.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment of the United States Constitution, as follows:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.** "

And the Seventh Amendment of the United States Constitution:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, **the right of trial by jury shall be preserved,** and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Also involved is Article I, § 11, of the Virginia constitution:

> "That **no person shall be deprived of his life, liberty, or property without due process of law**; ... that in controversies respecting property, and in suits between man and man, **trial by jury is preferable to any other, and ought to be held sacred.** * * * "

Also involved are Virginia's POA lien statutes, *Virginia Code (1950)*, as amended, *§55-514* through *§55-516.*

STATEMENT OF THE CASE

1. a. Petitioner Breedlove suffered significant deprivations of constitutionally-protected rights resulting from private individuals (Tysons Manor Homeowners Association) filing—under the Virginia property owners association lien law (*n.b.*, also referred to herein as POA lien law)—a false POA lien maliciously, for purposes of collection by coercion, against Petitioner Breedlove as lienee on a property which Petitioner no longer owned at the time that Tysons Manor Homeowners Association filed the offending POA lien. Title to the property

liened by Tysons Manor HOA had been transferred by deed in the public records over a month before the POA lien was filed.[2]

b. This improper naming of the Petitioner as lienee violated Virginia law, in that in Virginia, a lien must be filed against the property owner of record, according to the holding of the Virginia Supreme Court in ***Wallace v. Brumback***, 177 Va. 36, 12 S.E.2d 801 (1941). This offending POA lien was filed May 19, 1993, for $2,043.90, plus interest, costs, and attorney's fees, on an improved townhouse property in Fairfax County, Virginia, claiming *two years* of association dues and other charges, including unique trash removal, the association claimed against Petitioner Breedlove. This POA lien was not in compliance with the Virginia POA lien law for the creation of liens.[3] Tysons Manor HOA did not refile the POA lien properly against the new property owner.

c. Tysons Manor Homeowners Association filed the offending May 19, 1993, POA lien as ancillary process, for prejudgment attachment, subsequent to the filing on May 13, 1993, of an action in debt in state court, and not as judicial process to confer the *in rem* jurisdiction of the state court.

2. The Virginia property owners association lien law does not provide minimal predeprivation safeguards—notice and opportunity to be heard—prior to a POA lien attaching. Furthermore, the Virginia POA lien law does not provide for the posting of a lienor bond as a predeprivation safeguard. There are no postdeprivational remedies for redress of damages attributable to erroneous or false or malicious POA liens prescribed by Virginia statute and no entitlements to such redress created by Virginia case law.

3. In addition to there being no predeprivation safeguards under the Virginia property owners association lien law, there are no prescribed *entitlements* (either in Virginia statutory law or

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[2] For additional detail, see Appendix Exhibit 3, "Factual Background and Course of Proceedings Before the Trial Court in the Instant Action," at pages A4 - A11.

[3] *Virginia Code §55-516* permits liening only for association dues which became due during the *one year* immediately preceding the date on which the POA lien is filed, and for special assessments for capital projects, approved by the association board and applicable to all property owners generally, which became due during the *one year* immediately preceding the date of lien.

case law) to postdeprivational routes of redress for damages attributable to POA liens. Virginia's postdeprivational remedies for redress of damages caused by erroneous, or false, or malicious POA liens are inadequate to the point of nonexistence and do not satisfy the constitutional strictures of due process under *Connecticut v. Doehr*, 501 U.S. 1, 115 L.Ed.2d 1, 111 S.Ct 2105 (1991). Consequently, Petitioner Breedlove brought suit under 42 USC §1983 for redress of damages attributable to the May 19, 1993, POA lien.

4. a. The federal district court for the Eastern District of Virginia (the trial court) had *in personam* jurisdiction as to the Petitioner and as to all Respondents prior to the *dismissal order* of September 9, 1994, which dismissed not on a fair and substantive basis.

b. The federal district court abrogated its jurisdiction on September 9, 1994: (1) without rendering constitutionally-required decisions on claims of violation of federal civil rights and claims of unconstitutionality of Virginia statutes; (2) without making the determinations required by *Coleman v. Thompson, supra*; (3) without discharging its mandatory 28 USC §2403 (b) duty to certify the challange to the constitutionality of one or more of Virginia's statutes and to notify the Attorney General of Virginia; and (4) without rendering an opinion on the constitutionality of the Virginia POA lien law, challenged in the instant action and pleaded as being unconstitutional in the *Brief for the Appellant*.[4]

c. By the dismissal, *itself*, the federal district court denied Petitioner of both his federal and Virginia procedural due process and deprived Petitioner of his federal constitutional and federal civil rights.

5. a. The Fourth Circuit court of appeals had *in personam* jurisdiction as to the Petitioner, as to all Respondents, and as to Virginia by Petitioner's notice of November 4, 1994, to the Attorney General of Virginia, comporting with due process and comporting with 28 USC §2403 (b), prior to the dismissal of the

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[4] *Brief for the Appellant*, dated November 4, 1994, "Statement of Facts," paragraph F 9 c, at page 14, and "Reasons For Granting the Appeal," paragraph I. 1 a, at page 16, and paragraph I. 16, at page 27 thereof.

appeal in the *opinion* of April 4, 1995, which dismissed not on a fair and substantive basis.

b. The Fourth Circuit court of appeals abrogated its jurisdiction on April 4, 1995: (1) without rendering constitutionally-required decisions on claims of violation of federal civil rights and claims of unconstitutionality of Virginia statutes; (2) without making the determinations required by *Coleman v. Thompson, supra*; (3) without discharging its mandatory 28 USC §2403 (b) duty to certify the challange to the constitutionality of one or more of Virginia's statutes and to notify the Attorney General of Virginia; (4) without deciding all motions in the case; and (5) without rendering an opinion on the constitutionality of the Virginia property owners association lien law, challenged in the instant action and pleaded as being unconstitutional in the *Brief for the Appellant*.[5]

c. By the dismissal, *itself*, the Fourth Circuit court of appeals denied Petitioner of both his federal and Virginia procedural due process and deprived Petitioner of his federal constitutional and federal civil rights.

6. In its *opinion* of April 4, 1995, the Fourth Circuit court of appeals affirmed the lower court's dismissal, without hearing the merits of the constitutional questions raised in the appeal; let stand the federal district court's dismissal decision; and denied three of Petitioner's motions: (a) *Appellant's Motion for Written, Published, Self-Contained Memorandum Opinion the Court's Findings, Rulings, and Decision*, dated November 17, 1994; (b) *Appellant's Motion for Certification To Attorney General of Virginia, Pursuant to 28 USC §2403 (b), of Constitutional Challenge to Virginia Property Owners' Association Act*, dated January 26, 1995; and (c) *Appellant's Second Motion for Certification To Attorney General of Virginia, Pursuant to 28 USC §2403 (b), of Constitutional Challenge to Virginia Property Owners' Association Act and for Notification to Governor of Virginia, Pursuant to 28 USC §2403 (b), of Pendency of this Appeal*, dated March 7, 1995.

7. On April 14, 1995, Petitioner filed his *Petition for Rehearing*, with copies to opposing counsel and to the Attorney

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[5] See footnote 4, restated here.

General of Virginia, citing 28 USC §2403 (b), and certifying such in the certificate of service bound into each volume, following page 15 (the last page) of the *Petition*.

a. The *Petition for Rehearing* set forth three major arguments and allegations: (1) the Fourth Circuit court of appeals' decision to dismiss was arbitrary and capricious, without basis, or rationale, or legal authority to support it, ignored applicability of *Lugar v. Edmondson Oil Co., supra*, and ruled contrary to the U.S. Supreme Court's holding therein; (2) the Fourth Circuit court of appeals improperly denied Petitioner's motion to "publish" a written memorandum opinion in a case of first impression; and (3) the *petition* alleged a pattern of judicial conduct (encompassing the Virginia trial courts and Virginia Supreme Court, the Virginia Attorney General's office, and the federal district court for the Eastern District of Virginia) which pattern demonstrates a conspiracy of silence to maintain enforceability of unconstitutional Virginia law and to evade federal constitutional review, resulting in denial of procedural due process to Petitioner, as complainant, and converted into denial of Petitioner's federal constitutional rights and federal civil rights.

b. The Petitioner set forth good and sufficient reasons for the rehearing, which the Fourth Circuit court of appeals ignored. Those reasons are summarized in the Petitioner's quote, in footnote below, from the *Petition for Rehearing*.[6]

8. On April 17, 1995, the Fourth Circuit court's Clerk issued a letter to opposing counsel, with a copy to Petitioner, stating that Petitioner had failed to include a certificate of service and forwarding a copy of the *Petition for Rehearing* to opposing counsel, but not to the Attorney General of Virginia.

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[6] "[IV.] 1. The Fourth Circuit court of appeals, sitting *en banc*, should rehear this appeal because: (1) the court's action in rendering decision without complying with 28 USC §2403 (b), violates federal statutory law; (2) the Fourth Circuit court of appeals has overlooked both material fact and law in its decision; (3) the *opinion* is in conflict with decision of the Fifth Circuit and the conflict is not addressed in the *opinion*; (4) the *opinion* is in conflict with decisions of the United States Supreme Court and the conflict is not addressed in the *opinion*; and (5) the dismissal decision, *itself*, denies Petitioner's constitutional rights and, therefore, contravenes the holding of the Supreme Court in *Coleman v. Thompson, supra*, by the Fourth Circuit court of appeals' failure to make the required determinations that the dismissal decision, *itself*, does not abridge constitutional rights." [*Petition for Rehearing*, dated April 14, 1995, paragraph IV. 1, at pages 9-10.]

9. On April 24, 1995, in response to the Clerk's letter of April 17, 1995, Petitioner filed *Appellant's Motion (To the Court Sitting En Banc) to Correct Misrepresentation by the Clerk of the Fourth Circuit Court Concerning Alleged Failure of Appellant to Include Certificate of Service.* Petitioner's motion demonstrated that the certificate of service was properly included and bound into every printed copy of the *Petition for Rehearing*, at the point in each volume following the numbered pages of the *Petition* and immediately prior to the appendix, and alleged that the misrepresentation was a precursor to wrongful dismissal for failure to notice the defendants - appellees. This motion was never ruled upon and no dispositive order was ever entered.

10. On April 26, 1995, Petitioner filed *Appellant's Motion (To the Court Sitting En Banc) For 28 USC §2403 (b) Certification and Notification to Attorney General of Virginia of Constitutuional Challenge to Virginia Property Owners' Association Lien Law Contained in the Petition for Rehearing.* This motion was never ruled upon and no dispositive order was ever entered.

11. Also on April 26, 1995, Petitioner filed *Appellant's Motion (To the Court Sitting En Banc) For Written, Published, Self-Contained Memorandum Opinion of the Court's Findings, Rulings, and Decision on the Petition for Rehearing.* This motion was denied by *order* of May 26, 1995.

12. On May 1, 1995, the Clerk of the Fourth Circuit Court issued a letter to Petitioner, with a copy to opposing counsel, but not to the Attorney General of Virginia, which letter: (a) acknowledged receipt of Petitioner's April 24, 1995, motion to correct the Clerk's misrepresentation; (b) stated that the Clerk's office had overlooked the certificate of service; and (c) assured Petitioner that no misrepresentation was intended.

13. On May 19, 1995, the Fourth Circuit court issued *order* denying the *Petition for Rehearing* and Petitioner's request for rehearing *en banc*, and stating that, as no member of the Court or the panel requested a poll on the suggestion for rehearing *en banc*, the panel considered the petition and denied it. On its face, the May 19, 1995, *order* fails to rule on or to enter dispositive *order* for Petitioner's three motions filed concerning

the rehearing. In view of the allegations concerning judicial wrongdoing, by a subordinate district court, contained in the *Petition for Rehearing*, it is peculiar indeed that, in the words of the May 19, 1995, *order*: "no member of the Court or the panel requested a poll on the suggestion for rehearing *en banc*."

14. On May 26, 1995, the Fourth Circuit court issued *order* denying Petitioner's April 26, 1995, motion for written, published opinion. On its face, the May 26, 1995, *order* fails to rule on or to enter dispositive *order* regarding Petitioner's other two motions: (a) of April 24, 1995, concerning the Clerk's misrepresentation; or (b) of April 26, 1995, concerning 28 USC §2403 (b) certification and notification.

15. On May 30, 1995, the Fourth Circuit court of appeals issued its *mandate* that the judgment of the court takes effect that day. On its face, the May 30, 1995, *order* fails to rule on or to enter dispositive *order* regarding Petitioner's other two motions: (a) of April 24, 1995, concerning the Clerk's misrepresentation (on which the Clerk's May 1, 1995, letter did not constitute a judicial ruling); or (b) of April 26, 1995, concerning 28 USC §2403 (b) certification and notification.

16. On June 5, 1995, Petitioner filed timely with the Fourth Circuit court his *notice of appeal* to the U.S. Supreme Court, seeking review of the April 4, 1995, *opinion* and May 19, 1995, *order* of the Fourth Circuit court of appeals, and therein, requesting that the court vacate its *order* of May 30, 1995, and stay any *mandate* pending review by the U.S. Supreme Court.

17. On June 13, 1995, the Fourth Circuit court issued *order* denying the motion to recall and stay the mandate, pending review by the U.S. Supreme Court. On its face, the June 13, 1995, *order* fails to rule on or to enter dispositive *order* regarding Petitioner's other two motions: (a) of April 24, 1995, concerning the Clerk's misrepresentation (on which the Clerk's May 1, 1995, letter did not constitute a judicial ruling); or (b) of April 26, 1995, concerning 28 USC §2403 (b) certification and notification.

18. The denials of federal procedural due process and deprivation of Petitioner's federal constitutional rights and federal civil rights by the federal courts are demonstrated by the

course of proceedings set forth in Appendix Exhibit 3, in section B, "Course of Proceedings Before the Trial Court," at pages A5-A11.

REASONS FOR GRANTING THE WRIT

I. *The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law by violating the U.S. Supreme Court's holding in* Coleman v. Thompson, supra, *in three respects.*

1. The Fourth Circuit court of appeals' dismissal, *itself*, abridged one or more of Petitioner's federal constitutional rights, in that it violated procedural due process and equal protection under law in three respects: (a) by failing to make a determination in the April 4, 1995, *opinion*, that the decision, *itself*, to affirm the district court's dismissal to the instant action and to dismiss the appeal, not on a fair and substantive basis, did not abridge any constitutional rights; (b) by failing to make a determination in the May 19, 1995, *order*, that the decision, *itself*, denying the *Petition for Rehearing* and letting stand the dismissal of the appeal, not on a fair and substantive basis, did not abridge any constitutional rights; and (c) by failing in its review to assure that the federal district court made the determination in its September 9, 1995, *dismissal order*, that the dismissal decision, *itself*, not on a fair and substantive basis, did not abridge any constitutional rights.

2. The Fourth Circuit court of appeals failed *sua sponte* to make a determination, consistent with *Coleman v. Thompson, id.*, 115 L.Ed.2d, at 664, that the dismissal, *itself*, of the instant appeal would not abridge any constitutional rights.

3. The Fourth Circuit court of appeals failed to hear the Petitioner's action *de novo*, as is Petitioner's entitlement (as a matter of federal civil right) under 28 USC §1291, but instead, only reviewed the lower federal district court's action.

4. The Fourth Circuit court's: (a) failure to consider properly the elements of a cause of action under 42 USC §1983 and (b) dismissal, not on a fair and substantive basis—precluded the Fourth Circuit court of appeals hearing the merits and rendering decisions on the constitutional questions presented.

5. The Fourth Circuit court of appeals' affirmance of the lower court's decision, without the Fourth Circuit court of appeals addressing Petitioner's case *de novo*, resulted in a decision: (a) which decision upheld the lower court's ruling, that the Petitioner's *Amended Complaint* does not state a cause of action when it alleges that complaint in terms which parallel exactly the three elements of a cause of action under 42 USC §1983 as delineated in *West v. Atkins*, 487 U.S. 42, 101 L.Ed.2d 40, 108 S.Ct 2250 (1988), *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct 1908 (1981), and the subelements constituting action "under color of state law," as delineated in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 73 L.Ed.2d 482, 102 S.Ct 2744 (1982); and (b) which decision did so without any explanation of the failure in the Petitioner's allegation of cause of action and with a refusal to publish the decision.

6. These wilful actions and failures of the Fourth Circuit court of appeals denied Petitioner procedural due process and violated his federal constitutional rights and federal civil rights.

II. *The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law by violating the holding of the U.S. Supreme Court in* Ward v. Board of County Comm'rs, supra, *by disregarding the Court's duty (neglecting or renouncing a jurisdiction conferred by law), after the Fourth Circuit court of appeals possessed* in personam *jurisdiction as to all parties, by general appearances and/or by notice comporting with due process and with 28 USC §2403 (b).*

1. The U.S. Supreme Court has stated that the duty of courts: "cannot be disregarded without neglecting or renouncing a jurisdiction conferred by the law and designed to protect and maintain the supremacy of the constitution and the laws made in pursuance thereof. *Ward v. Board of County Comm'rs*, 253 US 17, 23, 64 L Ed 751, 40 S Ct 419 (1920). Indeed, the duty arose out of a distinct distrust of state courts, which the Court perceived as attempting to evade federal review."[7]

2. The U.S. Supreme Court has also stated: "Even though the constitutional protection invoked be denied on non-federal

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[7] Cited by Justices Blackmun, Marshall, and Stevens, in their dissent to *Coleman v. Thompson, id.* 115 L.Ed.2d, at 676-77.

grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair and substantial basis. If unsubstantial, constitutional obligations may not thus be evaded."[8]

3. By logical extension of these holdings, federal courts cannot evade their constitutional obligations, either.

4. The Fourth Circuit court of appeals possessed *in personam* jurisdiction as to all parties: by timely filing of the *Brief for the Appellant*; by notice; by general appearances; and by the filing of briefs, motions, and memoranda by all parties.

5. Thus, having acquired jurisdiction in the instant appeal, the Fourth Circuit court improperly renounced its jurisdiction in the instant appeal, over five months later, without hearing the merits of the federal constitutional questions in the appeal.

III. *The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law: (1) by affirming improperly the lower court's failure to discharge its jurisdictional 28 USC §2403 (b) duties; (2) by itself failing,* sua sponte, *and by refusing (upon three written motions) to discharge its jurisdictional 28 USC §2403 (b) duties; and (3) by affirming the September 9, 1994, dismissal order of the lower court and by itself issuing the April 4, 1995, opinion and May 19, 1995, order, each of which three orders is void for lack of jurisdiction to dismiss.*

1. Petitioner, as complainant and as appellant, was *entitled* (as a matter of federal civil right) to the application of the mandatory judicial procedure, as set forth in 28 USC §2403 (b) for certification and for notification.[9] The trial court and the Fourth Circuit court of appeals have deprived Petitioner

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[8] *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 US 537, 540, 74 L Ed 1023, 50 S.Ct 401 (1930), cited by Justices Blackmun, Marshall, and Stevens, in their dissent to *Coleman v. Thompson, id.* 115 L.Ed.2d, at 677.

[9] The provisions of 28 USC §2403 (b) state, in part: "(b) **In any action**, suit, or proceeding in a court of the United States **to which a State or any agency, officer, or employee thereof is not a party**, wherein the constitutionality of any statute of that State affecting the public interest is drawn into question, **the court shall certify such fact to the attorney general of the State**, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. * * *" [*bold emphasis added by Petitioner to 28 USC §2403 (b).*]

wrongfully and permanently of his entitlement (as a matter of federal civil right) under 28 USC §2403 (b), without Due Process—notice and an opportunity to be heard. This deprivation occurred in three respects:

a. By dismissing the instant action, with prejudice, without discharging the trial court's 28 USC §2403 (b) duties;

b. By itself failing to discharge the court's 28 USC §2403 (b) duties during the review of the appeal, and letting stand the lower court's dismissal of the instant action;

c. By itself failing to discharge the court's 28 USC §2403 (b) duties during the review of the *Petition for Rehearing*, and letting stand the dismissal of the instant appeal.

2. As a consequence of the federal district court's failure and the Fourth Circuit court of appeals' refusal to discharge their 28 USC §2403 (b) duties, which are jurisdictional, the trial court's September 9, 1994, *dismissal order* is void and the Fourth Circuit court of appeals' April 4, 1995, *opinion* and May 19, 1995, *order* are void, each of the three orders being void for lack of the respective court's jurisdiction to dismiss without discharging those mandatory, jurisdictional duties.

3. Despite the Fourth Circuit court's failure and refusal to discharge its 28 USC §2403 (b) duties in the instant appeal, the Fourth Circuit court still had notice jurisdiction as to Virginia because Petitioner, himself, notified the Attorney General of Virginia, pursuant to 28 USC §2403 (b), at the initiation of the appeal in the instant action and furnished that official with a copy of the *Brief for the Appellant*, and subsequent pleadings, each by first-class, certified mail, postage prepaid, in a manner comporting with due process and comporting with 28 USC §2403 (b). Thus, the Fourth Circuit court acquired *in personam* jurisdiction as to all parties, including Virginia, even though the court tried to evade obtaining that jurisdiction, and that jurisdiction once obtained could not properly be renounced without deciding the merits of the constitutional questions in the appeal.

The following demonstrates the Fourth Circuit court of appeals' improper affirmance of the lower court's failure to discharge its

jurisdictional 28 USC §2403 (b) duties, and itself refusing to discharge the 28 USC §2403 (b) duties—

4. Petitioner has not named the State of Virginia, or any officer or employee thereof, as a party to the instant action.

5. The *Complaint* of May 18, 1994, drew into question before the trial judge the constitutionality of a statute or statutes of Virginia affecting the public interest. Likewise, (a) the November 4, 1994, *Brief for the Appellant*, (b) the December 1, 1994, *Reply Brief for the Appellant*, and (c) the April 14, 1995, *Petition for Rehearing*, each drew into question before the Fourth Circuit court of appeals the constitutionality of a statute or statutes of Virginia affecting the public interest.

6. Thus, according to the prescription of 28 USC §2403 (b), the federal district court and the Fourth Circuit court of appeals "shall certify" to the Attorney General of Virginia the fact that one or more of Virginia's statutes has been challenged as to its constitutionality.

7. After the federal district court had failed, *sua sponte*, to discharge its mandatory, statutory duty, to certify and to notify, pursuant to 28 USC §2403 (b), and after the Fourth Circuit court had failed for two and one-half months, *sua sponte*, to discharge its mandatory, 28 USC §2403 (b) duties, the Petitioner, as a *pro se* appellant, filed *Appellant's Motion for Certification to Attorney General of Virginia, Pursuant to 28 USC §2403 (b), of Constitutional Challenge to Virginia Property Owners Association Act*, dated January 26, 1995, and *Appellant's Second Motion for Certification to Attorney General of Virginia, Pursuant to 28 USC §2403 (b), of Constitutional Challenge to Virginia Property Owners Association Act and for Notification to Governor of Virginia, Pursuant to 28 USC §2403 (b), of Pendency of this Appeal*, dated March 7, 1995. The Fourth Circuit court of appeals denied these two motions in footnote to the April 4, 1995, *opinion*.

8. After the Fourth Circuit court denied these two motions for the court to perform its mandatory duties, Petitioner filed *Appellant's Motion (To the Court Sitting En Banc) For 28 USC §2403 (b) Certification and Notification to Attorney General of Virginia of Constitutuional Challenge to Virginia Property Owners' Association Lien Law Contained in the Petition for*

Rehearing, dated April 26, 1995. The Fourth Circuit court failed to rule on or to enter dispositive *order* for this motion.

9. Substantive constitutional issues are involved and are raised in the original *Complaint*, in the *Amended Complaint*, in the *Brief for the Appellant*, and in the *Petition for Rehearing* by the Petitioner. The constitutional question raised in the instant action is substantial: Whether the Virginia property owners association lien law (*Virginia Code §55-514* through *§55-516*), *on its face*, violates the Due Process clause of the 14th Amendment of the federal Constitution, as interpreted by *Connecticut v. Doehr, supra*. The question is not frivolous.

10. Even if either the federal district court or the Fourth Circuit court of appeals were to have held that the constitutional question raised in the instant action is frivolous, such holding would not defeat the requirement that certification issue.[10]

11. It was the duty of the federal district court and of the Fourth Circuit court, (prescribed by 28 USC §2403 (b) and supported by the holdings of law in *Wallach v. Lieberman* and *Merrill v. Addison*, quoted in footnote below) not subject to judicial discretion:[11] (a) to certify the instant constitutional challenge; and (b) to notify the Attorney General of Virginia, pursuant to 28 USC §2403 (b).

12. Both the federal district court and the Fourth Circuit court of appeals failed to discharge their statutory *duties* under 28 USC §2403 (b). In so doing, each court: (a) deprived Petitioner wrongfully and permanently of his *entitlement*, granted under federal statute as a matter of federal civil right, to the courts' discharge of these mandatory duties, under 28 USC §2403 (b), and did so without Due Process; and (b) denied Petitioner procedural due process by failing to discharge the

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[10] a. "Under 28 USCS §2403, it is required that a district court, even though it finds that a constitutional question is frivolous, give notice to the Attorney General, leaving to him the decision whether to intervene." [*Wallach v. Lieberman*, 366 F.2d 254, 10 FR Serv 2d 747, 2 ALR Fed 969 (C.A.2, N.Y., 1966), cited in 28 USCS §2403, note 7, "Discretion," at 454.]
b. "Certification under 28 USCS §2403(b) is duty of court that should not be ignored, even if claim is obviously frivolous or may be disposed of on other grounds." [*Merrill v. Addison*, 763 F. 2d 80 (C.A.2, N.Y., 1985), 28 USCS §2403, note 7, "Discretion," at 454.]

[11] 28 USCS §2403, note 7, "Discretion," at page 454, discloses no holdings to the contrary.

courts' mandatory duties of 28 USC §2403 (b) certification and notification to the Virginia Attorney General.

13. Petitioner is well aware of the proper response by a federal district court under 28 USC §2403 (b). In another of Petitioner's cases, also a civil rights case under 42 USC §1983 against another property owners association, presently before the federal district court for the Western District of Virginia, the federal district judge, *sua sponte*, 14 days after initiation of the suit, entered an *order*: (a) certifying the constitutional challenge, and (b) notifying the Attorney General of Virginia.[12]

14. Thus, this first, instant suit of Petitioner's two civil rights suits under 42 USC §1983 (against two separate property owners associations), having similar facts, parallel allegations, and similar challenges to the constitutionality of Virginia statutory law, was accorded unequal treatment by the federal district court for the Eastern District of Virginia (and by the Fourth Circuit court of appeals) as compared to the Petitioner's second civil rights suit in the Western District of Virginia, where the court has discharged its 28 USC §2403 (b) duties.

The following demonstrates the September 9, 1994, order, the April 4, 1995, opinion, and the May 19, 1995, order are void for lack of jurisdiction—

15. On its face, the September 9, 1994, *dismissal order* fails to set forth that the federal district court has performed its mandatory jurisdictional duties under 28 USC §2403 (b). **See** copy of the September 9, 1994, *dismissal order* reproduced as Appendix Exhibit 4, at page A12.

16. The federal district court failed for three and one-half months to discharge its 28 USC §2403 (b) duty, *sua sponte*.

17. The district trial judge failed to rule on Petitioner's question in open court of whether the federal district court could hear the matter on September 9, 1994, without the Attorney General of Virginia being notified, pursuant to 28

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[12] Interestingly, in that other action, the entry of the 28 USC §2403 (b) certification *order* occurred the day immediately following the publication of a story in the newspaper about the Petitioner's suit.

USC §2403 (b).[13] In so doing, the trial judge failed to render the assistance due a *pro se* litigant, in accordance with *Gordon v. Leeke*, 574 F.2d 1147, 1152-53 (4th Cir.), cert. denied, 439 U.S. 970 (1978).

18. On their faces, the April 4, 1995, *opinion* and May 19, 1995, *order* fail to set forth that the Fourth Circuit court of appeals has performed its mandatory jurisdictional duties under 28 USC §2403 (b). **See** copies of the April 4, 1995, *opinion* and May 19, 1995, *order* reproduced as Appendix Exhibit 1 and 2, respectively, at pages A1-A3.

19. The Fourth Circuit court failed and refused for over six months to discharge its mandatory 28 USC §2403 (b) duties.

20. Drawing upon analogy to the principle that a single judge lacks jurisdiction to dismiss a three-judge matter, without making certain jurisdictional determinations, the Petitioner argues that both the trial judge and the circuit judges were without jurisdiction to dismiss either the instant action, or the instant appeal, or the *petition for rehearing*, without discharging the federal courts' mandatory duties under 28 USC §2403 (b),

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[13] The relevant oral proceedings in the September 9, 1994, hearing are set forth below, quoted from the *transcript*, which is reproduced in its entirety in Petitioner's *Reply Brief for the Appellant*, dated December 1, 1994, at pages A3-A19.

> "MR. BREEDLOVE: All right. One other item, Your Honor. As I had to prepare the memorandum in opposition to the defendants' motion and that got into substantial discussion of the unconsituttionality allegations of the Virginia statute, I'm asking now whether this Court can today hear this motion. That particular citation being the requirement that whenever a state statute is challenged, that the state's Attorney General be notified. And as yet I have not done that. And it became questionable in my mind as I prepared that memorandum and the degree to which it was evident that this case has to challenge the state's Constitution, the law, the constitutionality of the state's law, it then seemed to me that perhaps that provision of the federal code was invoked. And without that notification to the Attorney General, I'm asking whether this Court can hear that question.
>
> "THE COURT: Well, let me go ahead and hear the motion and you can raise that in whatever agrument you want in opposition to their motion." [excerpt from *transcript* of oral proceedings of September 9, 1994, hearing, at internal page 5, lines 7 - 25, and internal page 6, lien 1, reproduced in the *Reply Brief for the Appellant*, dated December 1, 1994, at pages A7-A8.]

The trial judge failed subsequently to return to this question in the oral proceedings or to address the matter of 28 USC §2403 (b) in the written *dismissal order* of September 9, 1994.

which duties are not subject to judicial discretion.[14] Petitioner asserts that his argument is supported by the holdings of law in *Wallach v. Lieberman* and *Merrill v. Addison*, quoted in footnote below.[15]

IV. ***The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law in failing de novo to hold that Petitioner had properly alleged a cause of action under 42 USC §1983, but rather affirming the lower court's dismissal for Petitioner's failure to state a cause of action—***

1. Three U.S. Supreme Court cases set forth the elements of a cause of action under 42 USC §1983.

2. Two U.S. Supreme Court decisions have defined the minimally-required elements to allege a proper cause of action under 42 USC §1983. These two decisions are *West v. Atkins*, *supra*, and *Parratt v. Taylor*, *supra*. In combination, those two decisions set forth three elements which must be alleged for a proper cause of action under 42 USC §1983.

3. In accordance with these two cases, Plaintiff has alleged properly the three elements of a cause of action under 42 USC §1983: that (1) some person has deprived the plaintiff of a federal right (**see** *Amended Complaint*, paragraphs 16–20, reproduced herein as Appendix Exhibit 5, at pages A13-A15); (2) the person who has deprived the plaintiff of that right acted under color of state or territorial law (**see** *Amended Complaint*, paragraphs 21–27 d, reproduced herein as Appendix Exhibit 6, at pages A15-A19); and (3) that state remedies are inadequate, attacking the state's corrective procedure as well as the substantive wrong (**see** *Amended Complaint*, paragraphs 28–31, reproduced herein as Appendix Exhibit 7, at pages A19-A22).

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[14] 28 USCS §2403, note 7, "Discretion," at page 454, discloses no holdings to the contrary.

[15] a. "Under 28 USCS §2403, it is required that a district court, even though it finds that a constitutional question is frivolous, give notice to the Attorney General, leaving to him the decision whether to intervene." [*Wallach v. Lieberman*, 366 F.2d 254, 10 FR Serv 2d 747, 2 ALR Fed 969 (C.A.2, N.Y., 1966), cited in 28 USCS §2403, note 7, "Discretion," at 454.]

b. "Certification under 28 USCS §2403(b) is duty of court that should not be ignored, even if claim is obviously frivolous or may be disposed of on other grounds." [*Merrill v. Addison*, 763 F. 2d 80 (C.A.2, N.Y., 1985), 28 USCS §2403, note 7, "Discretion," at 454.]

a. According to *West v. Atkins*, *supra*, the required elements of a cause of action under 42 USC §1983 are two-fold: that (1) some person has deprived the plaintiff of a federal right, and (2) the person who has deprived the plaintiff of that right acted under color of state or territorial law.

(1) Under *West*, Petitioner must allege and Petitioner has alleged that some person has deprived the Petitioner of a federal right, at paragraph 16, 17, 18, 19, and 20 of the *Amended Complaint*. **See** quoted paragraphs of *Amended Complaint*, as Appendix Exhibit 5, at pages A13 – A15.

(2) Under *West*, Petitioner must allege and Petitioner has alleged that the person who has deprived the Petitioner of that right acted under color of state or territorial law at paragraphs 21 through 27 d of the *Amended Complaint*. **See** quoted paragraphs of *Amended Complaint*, as Appendix Exhibit 6, at pages A15 – A19.

b. According to *Parratt v. Taylor*, *supra*, (overruled on other grounds by *Davidson v. Cannon*, 474 U.S. 344, 88 L.Ed.2d 677, 106 S.Ct. 668), Petitioner must also allege that state remedies are inadequate, and must attack the state's corrective procedure as well as the substantive wrong. Petitioner has made these allegations at paragraph 32 – 32 c of the *Amended Complaint*. **See** quoted paragraphs of *Amended Complaint*, as Appendix Exhibit 8, at pages A22 – A23.

4. The third U.S. Supreme Court case, *Lugar*, *supra*, defines the subelements constituting action "under color of state law," as necessary to a 42 USC §1983 cause of action.

a. Under *Lugar*, *supra*, Petitioner must further allege and Petitioner has alleged that the state statutory procedure used as a prejudgment remedy, for prejudgment attachment, is unconstitutional, at paragraph 28, 29, 30, and 31 of the *Amended Complaint*. **See** quoted paragraphs of *Amended Complaint*, as Appendix Exhibit 7, at pages A20 – A23.[16]

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[16] For an application of the updated *Doehr*-version of the three-part *Mathews* test to the Virginia POA lien law, quoted from the *Brief for the Appellant* in *Ex Parte Kendall H. Breedlove, ex rel. Tysons Manor Homeowners Association v. Breedlove, ex rel. Sky Bryce Association, Inc. v. Breedlove,*

b. In particular, under *Lugar, supra,* Petitioner must further allege and Petitioner has alleged that Defendants' actions were accomplished "under color of state law," at paragraphs 21 through 27 of the *Amended Complaint*, and that state law is challenged as being unconstitutional in the *Amended Complaint.* **See** quoted paragraphs 21 – 27 d, of *Amended Complaint,* as Appendix Exhibit 6, at pages A15 – A19.

5. The foregoing elements may be seen in the *Amended Complaint's* paragraphs cited following the discussion of each element, above, and are summarized in the *Amended Complaint's* summary paragraph 15, quoted in footnote below.[17]

6. Thus, Petitioner has alleged properly a cause of action under 42 USC §1983, which should be the basis: (a) for reversing the Fourth Circuit court of appeals' ruling to dismiss, (b) for remanding the case to the Fourth Circuit court of appeals for hearing on the merits of the constitutional questions, and (c) for subsequent remand of the case to a federal district court for jury trial upon the merits.

V. *Fourth Circuit Court of Appeals' Decision To Dismiss Was Arbitrary and Capricious, Without Basis, or Rationale, or Legal Authority to Support It, Ignored Applicability of* Lugar v. Edmondson Oil Co., supra, *and Ruled Contrary to U. S. Supreme Court's Holding Therein —*

1. Petitioner has cited the legal authority of the Fifth Circuit court of appeals, in *Folsom Investment Co. v. Moore,*

(E.D. Va., file no. CA-94-639-A, dism'd [unpubl.], 1995; C.A.4, no. 95-1737) see Appendix Exhibit 11, at pages A31-A47.

[17] "15. This complaint is a cause of action under *42 USC §1983* against Defendants who, acting under color of unconstitutional state law and process—a lien created under the unconstitutional Virginia Property Owners Association Act, particularly *Virginia Code §55-514* through *§55-516*—subjected the Plaintiff or caused the Plaintiff to be subjected (the Plaintiff being a citizen of the United States) to the deprivation of his rights, privileges, or immunities secured by the Constitution and laws of the United States, in that Defendants filed a Property Owners Association lien on May 19, 1993, as ancillary process for prejudgment attachment, against Plaintiff, as named lienee, which lien (a) was unconstitutional for invoking unconstitutional state law (*Virginia Code §55-514* through *§55-516*), (b) was unlawful under 42 USC §1983, and (c) was unlawful for not being in compliance with *Virginia Code §55-516* for the creation of liens and, as a direct and proximate result of Defendants actions, conduct, or omissions, Plaintiff was deprived of his federally-protected civil rights and suffered general and special damages, including special injury." [*Amended Complaint,* dated July 22, 1994, paragraph 15.]

681 F.2d 1032, at 1037 (5th Cir., 1982), in its interpretation of *Lugar, supra*, to the effect that when unconstitutionality of a state attachment procedure is alleged, as in the Petitioner's Amended Complaint, the private party who set that prejudgment attachment scheme in motion is to be considered a state actor.[18]

a. Petitioner pleaded the legal authority of *Folsom, supra*, in the September 9, 1994, hearing at the federal district court. See excerpt of *transcript*, paragraphs 1 e and 1f, in Appendix Exhibit 9, at pages A24– A25 herein.

b. Petitioner pleaded the legal authority of *Folsom, supra*, in the November 4, 1994, *Brief for the Appellant*, the December 1, 1994, *Reply Brief for the Appellant*, and the April 14, 1995, *Petition for Rehearing*.

2. Petitioner alleged prejudgment attachment by ancillary process, seizure and holding of the property in the *Amended Complaint*.[19]

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[18] "The Supreme Court reversed the Fourth Circuit in *Lugar* and held that when a § 1983 plaintiff challenges the constitutionality of a state attachment procedure, as opposed to making mere nonconstitutional allegations of misuse or abuse of the statute, **the private party who sets that attachment scheme in motion is to be considered a state actor**. — U.S. —, —, 102 S.Ct. 2744, 2756, 73 L.Ed.2d 482 (1982). Thus, insofar as Folsom and the Scullins have alleged that the Louisiana attachment scheme is violative of the constitution, ***the private parties who set that scheme in motion acted under color of state law.***" [*bold emphasis added by Petitioner to Folsom Investment Co., Inc. v. Moore*, 681 F.2d 1032, at 1037 (5th Cir., 1982).]

Note that the Fifth Circuit court of appeals did not state when attachment occurs as a prerequisite, but merely when unconstitutionality of a state attachment procedure is alleged.

[19] The relevant paragraphs are quoted from the *Amended Complaint*, dated July 22, 1994, as follows:

a. "16. On May 19, 1993, Defendants Tysons Manor HOA and Charlotte M. Schow, acting as Treasurer of the Association, and John Doe, acting jointly, deprived the Plaintiff of significant rights and interests, protected under the Fourteenth Amendment of the Constitution of the United States and under Article I, §11, of the Constitution of Virginia, in that Defendants did file a lien, naming Plaintiff Breedlove therein as lienee, under the unconstitutional Virginia Property Owners Association lien statute, Virginia Code (1950), as amended, §55-516, as ancillary process for prejudgment attachment, filed without Due Process—without notice and without opportunity to be heard—subsequent to the filing of a judicial process of a warrant in debt." [*Amended Complaint*, paragraph 16, reproduced in Appendix Exhibit 5, at page A14 herein.]

b. [16. c] "(3) Defendants filed the May 19th lien as an ancillary process, for prejudgment attachment, subsequent to filing a judicial

3. Based on the trial judge's apparent conclusion that there was no attachment (a conclusion as to a question of fact which invaded the prerogatives of the jury) the trial judge proceded to conclude that *Lugar, supra*, was inapplicable, despite Petitioner having argued the applicability of *Lugar*, in circumstances either of allegations of unconstitutionality of a state statute or of pre-judgment attachment.[20] Accordingly, the trial judge dismissed the instant action. The trial judge's ruling and his decision to dismiss were error. This is part of the reasoning of the lower court which the Fourth Circuit court has affirmed.

4. The federal district court dismissed the instant action based on Petitioner having failed to state a cause of action because Petitioner's allegation of Respondents invoking a state law (pleaded as being unconstitutional) constituted action "under color of state law" did not, in the court's opinion, constitute action "under color of state law."

5. Respondents' proposition in their *Brief of the Appellees* is that Tysons Manor HOA did not act under color of state law. Here Respondents argued the question of *fact* of whether they acted "under color of state law," not the question of *law* of whether Petitioner has alleged that Respondents acted under color of state law.

6. Either (a) the trial judge ruled erroneously in fact, invading the prerogatives of the jury to determine questions of fact, and denying to Petitioner civil trial by jury under the Seventh Amendment of the federal Constitution; or (b) the trial

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process of a warrant in debt." [*Amended Complaint*, paragraph 16 c (3), reproduced in Appendix Exhibit 5, at page A15 herein.]

c. "36. The unconstitutional May 19th lien identified the *res*—the liened real property—sufficiently accurately and clearly in paragraph numbered 1, at page 1862, thereof, for anyone searching the title records to have actual notice that the title of the property was in dispute, thus invoking the *lis pendens* doctrine and the corollary *pendente lite* doctrine, and to have actual notice that there was a lien on the property.

d. "37. The unconstitutional **May 19th lien seized and held the *res*—the liened real property—in *custodia legis* for 202 days**, from May 19, 1993, to December 7, 1993." [*bold emphasis added by Petitioner to Amended Complaint*, paragraphs 36 and 37.]

[20] For a quotation from the *Reply Brief for the Appellant*, showing a side-by-side comparison of Petitioner's allegations from the *Amended Complaint* versus the trial judge's verbal findings and ruling from the September 9, 1994, oral proceedings, see Appendix Exhibit 10, at pages A26-A31.

judge ruled erroneously in law contravening the U.S. Supreme Court in *Lugar, supra*, and contravening the Fifth Circuit court of appeals in *Folsom Investment Co. v. Moore, supra.*

7. Petitioner has alleged, in extreme detail, that "Defendants acted under color of state law," in paragraphs 21 through 27 d of the *Amended Complaint,* reproduced as Appendix Exhibit 6, at pages A15 – A19 herein.

8. In particular, Petitioner has alleged at paragraphs 24 and 27 of the *Amended Complaint:*

> "24. The Defendants are parties who may fairly be said to be state actors, in that they acted together with or obtained significant aid from state officials. **See** *Lugar, supra*, at 495.[3]" [21]

> "27. The Defendants caused the May 19, 1993 memorandum of lien to be admitted to record as a lien through the direct action, participation, and assistance of an official of the Commonwealth of Virginia--the Clerk of the Circuit Court of Fairfax County, thus characterizing the Defendants, although private parties, as state actors for purposes of the Fourteenth Amendment of the United States Constitution. **See** *Lugar, supra*, at 498.[1]" [22]

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[21] The following footnote is quoted from the referenced footnote 3 in the *Amended Complaint:*

> "[3] Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.' [*Lugar v. Edmondson Oil Co., supra, id.*, at 495.]"

[22] The following footnote is quoted from the referenced footnote 1 in the *Amended Complaint:*

> "[1] 'As is clear from the discussion in Part II, we have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment. The rule in these cases is the same as that articulated in Adickes v. S.H. Kress & Co., supra, at 152, 26 L Ed 2d 142, 90 S Ct 1598, **in the context of an equal protection deprivation:**
>
> '"Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require

9. If proved true, these allegations are key allegations in the chain of logic and facts for jury determination.

10. Respondents' arguments dispute the issue, a question of *fact*, denying that their actions constitute action together with or obtaining significant aid from state officials.

a. The Respondents' argument against the *Amended Complaint* in their August 11, 1994 *memorandum* supporting their *motion to dismiss* was a *denial*—that they (the Respondents, as defendants) did not act under color of state law—addressing the issue, not an argument that Petitioner had failed to state his case properly and apprise the Respondents of the case being brought against them. In their August 11, 1994 *memorandum*, the Respondents failed to traverse the Petitioner's detailed "under-color-of-state-law" allegations with their argument. So, too, in the November 18, 1994, *Brief of Appellees*, the Respondents failed to traverse the Petitioner's detailed "under-color-of-state-law" allegations with their argument.

b. Had the Respondents traversed the Petitioner's detailed "under-color-of-state-law" allegations and sub-allegations with their argument, it would have permitted the Court to isolate easily the Respondents' disagreement with the Petitioner's allegations. Instead, the Respondents relied on a general assertion that they did not act "under color of state law." Thus, the Respondents denied the factual issue not the properness of the Petitioner's allegations.

11. By *innuendo*, which Petitioner denies, the Respondents sought to imply that Petitioner has not challenged, in his *Amended Complaint*, the constitutionality of the state statute (i.*e.*, *Virginia Code §55-516*) which Respondents invoked, but merely complains of Respondents' misuse of the state statute. On the basis of this *innuendo*, the Respondents then proceeded to

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> that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents."' quoting United States v. Price, 383 US, at 794, 16 L Ed 2d 267, 86 S Ct 1152."' [*Lugar v. Edmondson Oil Co., supra, id.*, at 498.]" [*bold emphasis added by Appellant to Lugar, supra.*]

The Plaintiff alleged an Equal Protection deprivation in the *Amended Complaint*, paragraphs 19 - 20 (see Appendix Exhibit 5, at page A15, herein).

argue that mere invocation of state statute does not constitute "joint participation" with state officials.

12. Respondents' arguments are without merit and sought to misdirect the Court's attention, because Petitioner has alleged constitutional challenge to *Virginia Code §55-514* through *§55-516*, in paragraphs 28 through 31 of the *Amended Complaint*, reproduced as Appendix Exhibit 7, pages A19 – A22, herein.

13. In such circumstances of constitutional challenge being alleged, as in the *Amended Complaint*, the Respondents being willful participants with the State or its agents is enough to characterize the Respondents as state actors, acting under color of state law, in accordance with the U.S. Supreme Court's holding in *Lugar v. Edmondson Oil Co., supra*, and the Fifth Circuit's holding in *Folsom Investment Co. v. Moore, supra*.

14. The Fourth Circuit court affirmed the lower, federal district court's dismissal of the instant action for failure to state a cause of action under 42 USC §1983. Thus, the Fourth Circuit court's affirmance of the lower court's dismissal of the instant action places the Fourth Circuit court at variance with the Fifth Circuit court's decision in *Folsom Investment Co. v. Moore, supra*, and in opposition to the U.S. Supreme Court in *Lugar v. Edmondson Oil Co., supra*. The Fourth Circuit court's April 4, 1995, *opinion* does not explain that variance or that opposition, which is why the issuance of a detailed, "published" memorandum opinion by the Fourth Circuit court is important and why the "published" memorandum opinion was sought by the Petitioner's motion to publish. The Petitioner's motion to publish was denied by the Fourth Circuit court in the footnote to the April 4, 1995, *opinion*, without comment.

VI. *The Fourth Circuit court of appeals committed prejudicial, reversible error, denied procedural due process, and denied equal protection under law by failing to apply properly the rulings of what constitutes action "under color of state law," as defined* by Lugar v. Edmondson Oil Co., supra, Folsom Investment Co., Inc. v. Moore, supra, *and* Lomax v. Davis, supra—

1. Petitioner's reliance on *Lugar, supra*, is proper. Petitioner may rely upon *Lugar, supra*, either in circumstances

of allegations of unconstitutionality of state statutes or in circumstances of prejudgment attachment. This interpretation is consistent with *Eggleston v. Prince Edward Volunteer Rescue Squad*, 569 F.Supp.1344, at 1348 (E.D. Va., 1983).

a. In the *Amended Complaint*, Petitioner has alleged the unconsitutionality of the Virginia statutory procedure (*Virginia Code §55-514* through *§55-516*) for the creation of POA liens.[23]

b. In the *Amended Complaint*, Petitioner has alleged prejudgment attachment.[24]

2. The argument advanced by the Respondents, at page 4, and 5-6 of their *memorandum*,[25] is the same argument made by the Respondents in *Lugar, supra* — that invoking the state statute does not constitute acting under color of state law. Although this argument was upheld by the District Court and by the Fourth Circuit Court of Appeals in *Lugar*, those courts' decisions were reversed explicitly by the U.S. Supreme Court in *Lugar*, with a special note to the Fourth Circuit Court that its opinion was wrong.[26]

3. a Respondents' argument in their August 11, 1994 *memorandum* is that '...defendants did no more than invoke a presumptively valid state lien procedure because of plaintiff's failure to pay his homeowner association dues."[27] Petitioner

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[23] *Amended Complaint*, filed July 22, 1994, at paragraphs 21, 23, 25, 26, 28, 29, 29a – k, 30, 31, 39, 47, 47a – k, 48, and 54.

[24] *Amended Complaint*, filed July 22, 1994, at paragraphs 15, 16, 16 c (3), 18, 41, 56, 57, 59, 60, 60a and 60b, 67c, and 69d.

[25] *Defendants' Memorandum of Points and Authorities in Support of Its Motion to Dismiss Plaintiff's Amended Complaint*, August 11, 1994, pages 4, 5-6.

[26] "The **Court of Appeals** [*Fourth Circuit*] **erred in holding that in this context 'joint participation' required something more than invoking the aid of state officials** to take advantage of state-created attachment procedures. **That holding is contrary to the conclusions we have reached** as to the applicability of due process standards to such procedures. Whatever may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute."

"In summary, petitioner was deprived of his property through state action; **respondents were, therefore, acting under color of state law in participating in that deprivation.**" [*bold emphasis added by Petitioner to Lugar, supra, id.*, 457 U.S., at 942, 73 L.Ed.2d, at 498.]

[27] *Defendants' Memorandum, id.*, p. 4, paragraph 1.

denies this claim of Respondents and any adverse inferences arising from it.

b. Respondents' attorney, who knew or should have known of recent and prior Supreme Court decisions regarding Due Process for state laws creating liens (**see** *Connecticut v. Doehr, supra*), had no reason to presume that the Virginia POA lien law was constitutional. To the contrary, the Respondents' attorney should have presumed to the contrary—that the Virginia POA lien law was unconstitutional—and should have taken appropriate steps to provide minimum Due Process—notice and an opportunity to be heard—consistent with *Connecticut v. Doehr, supra*, and with *Mullane v. Central Hanover B. & T. Co.*, 339 U.S., at 313, 94 L.Ed, at 873, 70 S.Ct. 652 (1950) and its progeny.[28]

c. Respondents specifically failed to provide the 10-day prior notice required by the Virginia POA lien law, thus demonstrating their intent to deprive the Petitioner of Due Process wilfully and with wanton, reckless disregard of the constitutional rights of others.

4. Respondents invoked the Virginia POA lien law, creating a POA lien against Petitioner, as an ancillary process—for prejudgment attachment—having already filed the action in debt and caused the May 13, 1993 *warrant in debt* (a *writ*) to issue. The *warrant in debt* was employed as judicial process, to command the appearance of the person summoned (the Petitioner herein), and to confer the Court's *in personam* jurisdiction.

5. Thus, the Respondents employed the subsequently-filed POA lien as ancillary process to the preceding action in debt and for prejudgment attachment.

6. Respondents admitted, by counsel, that they invoked the Virginia POA lien law, creating a POA lien under that state statute, and admitted receiving aid from a state employee in that

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[28] "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." [*Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, at 800, 77 L.Ed.2d 180, at 188, 103 S.Ct. 2706, at 2712 (1983).]

"a Circuit Court Clerk recorded the memorandum [*of lien*] "[29] Petitioner has challenged the constitutionality of the Virginia POA lien statute in his *Amended Complaint* and has alleged prejudgment attachment by the Respondents' actions, which allegations he is prepared to prove. Thus, in accordance with *Lugar, supra*, (quoted in footnote to paragraph VI. 2 above) Respondents actions were taken under color of state law.

7. The Fifth Circuit court of appeals in *Folsom Investment Co., Inc. v. Moore, supra*, held that private parties who set an attachment scheme in motion acted under color of state law.[30]

8. Furthermore, in *Lomax v. Davis*, after the U.S. District Court for the Northern District of Mississippi quoted the above-cited holding from *Folsom, supra*, the district court stated: " **The same is true of any state statute or procedure used by a private party to deprive an individual of his civil rights.**" [*bold emphasis added by Petitioner to Lomax v. Davis*, 571 F.Supp. 805, at 807 (N.D. Miss., 1983)

9. The ruling of the district trial court—that Respondents did not act under color of state law—is without merit and erroneous. Petitioner has alleged that Respondents acted under color of state law and process, and fairly apprised Respondents of the case brought against them. Petitioner is entitled to produce evidence to prove those allegations before a jury.

CONCLUSION

The Fourth Circuit court of appeals' dismissal, *itself*, of the appeal abridged one or more of Petitioner's federal constitutional rights, in that it violated procedural due process and equal protection under law. The Fourth Circuit court of appeals ignored the holding of *Coleman v. Thompson, supra*, in its review of the *Brief for the Appellant*, dated November 4, 1994, and of the *Petition for Rehearing*, dated April 14, 1995. On the faces of the April 4, 1995, *opinion*, and of the May 19, 1995, *order*, the Fourth Circuit court of appeals failed *sua sponte* to make a determination, consistent with *Coleman v. Thompson*,

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[29] *Defendants' Memorandum, id.*, p. 5, paragraph 3.

[30] See holding from *Folsom, supra*, quoted previously in footnote 18, at page 21.

supra, that the dismissal, *itself*, of the appeal, not on a fair and substantive basis, would not abridge any constitutional rights

On the faces of the April 4, 1995, *opinion*, and of the May 19, 1995, *order*, the Fourth Circuit court of appeals failed *sua sponte* and refused, upon three written motions, to discharge its mandatory duty under 28 USC §2403 (b), prior to letting stand the lower court's dismissal of the instant action, and dismissing the appeal, without rehearing. By so doing, the Fourth Circuit court deprived Petitioner wrongfully and permanently of his entitlement (as a matter of federal civil right) to the provisions of 28 USC §2403 (b), and did so without Due Process—notice and an opportunity to be heard.

Furthermore, the failures of the federal district court and of the Fourth Circuit court of appeals to discharge their judicial duties pursuant to 28 USC §2403 (b) are jurisdictional and, thus, the September 9, 1994, *dismissal order* of the federal district court and the Fourth Circuit court's April 4, 1995, *opinion* and May 19, 1995, *order* denying rehearing are each void for lack of jurisdiction to dismiss without the courts' discharge of their 28 USC §2403 (b) duties and without hearing the merits of the challenge to the constitutionality of the Virginia POA lien law.

WHEREFORE, Petitioner prays that a *writ of certiorari* issue from this Court to review the judgments of the Fourth Circuit court of appeals in *Breedlove v. Tysons Manor Homeowners Association, et al.*, docket no. 94-2316, as to (1) its failure to render a decision on the constitutionality challenge to the Virginia POA lien law; (2) its failure to hear *de novo* the question of whether Petitioner stated a proper cause of action under 42 USC §1983; and (3) its affirmance of the lower court's ruling that the Petitioner failed to state a cause of action under 42 USC §1983, based on a void *dismissal order*. In the event this *Petition* is granted, Petitioner prays that this Court remand this case to the Fourth Circuit court, with direction for the Fourth Circuit court: (1) to perform its duties under 28 USC §2403 (b); (2) to render the Fourth Circuit court's published opinion, in a manner consistent with *Connecticut v. Doehr, supra*, on the challenges raised in the instant appeal to the constitutionality of the Virginia POA lien law, *Virginia Code (1950) §55-514* through *§55-516*, and delineated more fully in the Petitioner's *Brief for the Appellant* and *Reply Brief for the*

Appellant to the Fourth Circuit court; and (3) to make written determinations consistent with *Coleman v. Thompson*, *supra*.

In the event that the dismissal decision, *itself*, in the instant appeal, is found to have abridged Petitioner's federal constitutional rights, that this Court direct the Fourth Circuit court then: (1) to hear the merits of the appeal, as to whether a proper cause of action is stated; and (2) to render the Fourth Circuit court's published opinion, in a manner consistent with *Lugar v. Edmondson Oil Co.*, *supra*, and resolving or distinguishing any variances in its opinion as compared to the Fifth Circuit court's opinion in *Folsom Investment Co., Inc. v. Moore*, *id.*, at 1037; together with such other and further relief as may seem proper to this Court.

Respectfully submitted,

Kendall H. Breedlove

Kendall H. Breedlove, *pro se*

CERTIFICATE OF SERVICE

SS: COMMONWEALTH OF VIRGINIA
~~County of Fairfax~~, to-wit:
CITY OF ALEXANDRIA

KENDALL H. BREEDLOVE, being first duly sworn, upon his oath deposes and says that he is a Petitioner filing *pro se*, in this cause, and that on this 17th day of August, 1995, pursuant to Rule 29.5 (c) of the *Supreme Court Rules*, he mailed three copies each of the ***Petition for Writ of Certiorari*** by first-class mail, postage prepaid, addressed to the counsel of record for the Respondents, who were represented by counsel, as follows:

Mr. John D. McGavin, counsel of record for Respondents
Tysons Manor Homeowners Association and
Charlotte M. Schow
Lewis, Trichilo, Bancroft, McGavin & Horvath, P.C.
4117 Chain Bridge Road, Suite 400, P.O. Box 22
Fairfax, Virginia 22030

Pursuant to Rule 29.4 (c), citing that 28 USC §2403 (b) may be applicable, he mailed three copies of the *Petition for Writ of Certiorari* by certified mail, postage prepaid, as follows:

The Honorable James S. Gilmore, III
Attorney General of the Commonwealth of Virginia
Supreme Court Building
101 N. 8th Street
Richmond, Virginia 23219

Kendall H. Breedlove

Kendall H. Breedlove, *pro se*

THE FOREGOING CERTIFICATE OF SERVICE was subscribed and sworn to before me by Kendall H. Breedlove on the 17th of August, 1995.

Dalyce S. Jensen
Notary Public

My commission expires: 10.31.98

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APPENDIX TO

KENDALL H. BREEDLOVE,
Petitioner

v.

TYSONS MANOR HOMEOWNERS
ASSOCIATION, *et al.*
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX

Exhibit 1 Unpublished April 4, 1995, Opinion of the Fourth Circuit Court of Appeals

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-2316

KENDALL H. BREEDLOVE

Plaintiff - Appellant,

versus

TYSONS MANOR HOMEOWNERS ASSOCIATION,

Defendant - Appellee

and

CHARLOTTE M. SCHOW; JOHN DOE,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, District Judge. (CA-94-647-A)

Submitted : March 7, 1995 Decided: April 4, 1995

Before NIEMEYER and HAMILTON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Kendall H. Breedlove, Appellant Pro Se. John David McGavin, LEWIS, TRICHILO & BANCROFT, P.C., Fairfax, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

Exhibit 1, continued[1]

PER CURIAM:

Appellant appeals from the district court's order denying relief on his 42 U.S.C. § 1983 (1988) complaint. Our view of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court.* Breedlove v. Tysons Manor Homeowners Ass'n, No. CA-94-647-A (E.D. Va. Sept. 9, 1994). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

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* We deny Appellant's motions for certification. We also deny Appellant's "Motion For Written, Published, Self-Contained Memorandum Opinion Of The Court's Findings, Rulings And Decision" pursuant to 4th Cir. I.O.P. 36.4.

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[1] Note that, on its face, the *opinion* fails to set forth the Fourth Circuit court's compliance with 28 USC §2403 (b), but instead, demonstrates the court's refusal to comply by denying two motions for 28 USC §2403 (b) certification compliance in the footnote to the *opinion*. Also note that, on its face, the *opinion* fails to set forth the determinations required by *Coleman v. Thompson, supra*, that the dismissal decision, *itself*, does not abridge any constitutional rights.

Exhibit 2 Unpublished May 19, 1995, Order of the Fourth Circuit Court of Appeals[2]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-2316
CA-94-647-A

KENDALL H. BREEDLOVE
Plaintiff - Appellant

v.

TYSONS MANOR HOMEOWNERS ASSOCIATION,
Defendant - Appellee

and

CHARLOTTE M. SCHOW; JOHN DOE,
Defendants

- - - - - - - - - - - - - - -

On Petition for Rehearing with
Suggestion for Rehearing In Banc

- - - - - - - - - - - - - - -

The appellant's petition for rehearing and suggestion for rehearing in banc and supplement were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

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[2] The *Petition for Rehearing* alleged, among other things, "a pattern of judicial conduct demonstrating a conspiracy of silence to maintain enforceability of unconstitutional Virginia law and to evade federal constitutional review, resulting in denial of procedural due process to Complainant and converted into denial of Complainant's federal constitutional rights and federal civil rights," which pattern of conduct included the federal district court for the Eastern District of Virginia.

Exhibit 3 Factual Background and Course of Proceedings Before the Trial Court in the Instant Action

A. Factual background—

1. For purposes of collection by coercion, private individuals (Tysons Manor Homeowners Association) filed—under the Virginia POA lien law—a false POA lien maliciously, against Petitioner Breedlove as lienee on a property which Petitioner no longer owned at the time that Tysons Manor Homeowners Association filed the offending POA lien. Title to the property liened by Tysons Manor HOA had been transferred by deed in the public records over a month before the POA lien was filed. This improper naming of the Petitioner as lienee violated Virginia law, in that in Virginia, a lien must be filed against the property owner of record, according to the holding of the Virginia Supreme Court in ***Wallace v. Brumback***, 177 Va. 36, 12 S.E.2d 801 (1941). This offending POA lien was filed May 19, 1993, for $2,043.90, plus interest, costs, and attorney's fees, on an improved townhouse property in Fairfax County, Virginia, claiming *two years* of association dues and other charges, including unique trash removal, the association claimed against Appellant Breedlove.[3] Tysons Manor HOA did not refile the POA lien properly against the new property owner.

2. On May 13, 1993, Tysons Manor HOA caused a personal action in debt against Petitioner Breedlove to be filed in the General District Court of Fairfax County, Virginia, by "Warrant in Debt," dated May 13, 1993, case no. C93-13539, alleging a debt against Appellant in the amount of $2,043.90, plus interest, costs, and reasonable attorney's fees. Court records indicate bad return of service when the case was called on July 12, 1993, the return date. Tysons Manor has entered no nonsuit and no other termination of this action has been had. Thus, this controversy is an on-going controversy or case. Petitioner denies this debt and asserts affirmative defense of payment.

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[3] *Virginia Code §55-516* permits liening only for association dues which became due during the *one year* immediately preceding the date on which the POA lien is filed, and for special assessments for capital projects, approved by the association board and applicable to all property owners generally, which became due during the *one year* preceding the date of lien.

3. On May 19, 1993, Tysons Manor HOA caused to be recorded in the land records of Fairfax County, Virginia, in Deed Book 8562, at Pages 1862 – 1865, a "Memorandum of Lien," dated April 28, 1993, (hereinafter referred to as May 19th POA lien) against Petitioner Breedlove, as named lienee, and against property identified as lot #32, Tysons Manor, commonly known as 8149 Larkin Lane, Vienna, Virginia, 22182—the Fairfax County property—which lien in the amount of $2,043.90, for two years of association dues and other charges the association claimed against Petitioner Breedlove. Petitioner denies this debt and asserts affirmative defenses of payment and unconstitutionality.

4. On July 12, 1993, upon the *Tysons Manor Homeowners Association v. Kendall H. Breedlove*, (Fairfax County #C93-13539) "Warrant in Debt" action being called in General District Court, court records indicate bad return of service was made.

5. On December 12, 1993, Tysons Manor HOA caused to be recorded a satisfaction and release, dated November 18, 1993, in the land records of Fairfax County, Virginia, in Deed Book 8892, at Page 978, which released of record the May 19th lien. In order to be able to settle on a sale transaction, the April 2nd deed holder had to pay the May 19th POA lien of Tysons Manor Homeowners Association.

B. Course of proceedings before the trial court—

1. a. On May 18, 1994, Petitioner Breedlove, as plaintiff, filed his original *Complaint* in this action, dated May 18, 1994, alleging a cause of action under *42 USC §1983*, and had service effected upon the registered agent for Respondent Tysons Manor Homeowners Association, as defendant, on May 25, 1994, and upon Respondent Charlotte M. Schow, as defendant, on May 27, 1994.

b. Respondent Schow was the Treasurer of Tysons Manor Homeowners Association, who (a) signed the *affidavit* supporting the *warrant in debt* in *Tysons Manor Homeowners Association v. Kendall H. Breedlove*, filed in the General District Court of Fairfax County, Virginia; and (b) signed the *memorandum of lien*, for the POA lien filed against Petitioner Breedlove in the Circuit Court of Fairfax County, Virginia.

2. On June 14, 1994, counsel for both Respondents Tysons Manor Homeowners Association and Charlotte M. Schow (one counsel representing both defendants) filed a joint *motion to dismiss*, pursuant to Fed. R. Civ. P. 12 (b) (6) of the *Federal Rules of Civil Procedure*, on the grounds that the *Complaint* fails to state a claim on which relief can be granted. Concurrently, a single counsel for both Defendants also filed a *brief in support of motion to dismiss*. Defendants' counsel noticed the *motion to dismiss* for hearing on July 1, 1994, and amended that notice for rescheduled hearing on July 8, 1994.

3. On June 28, 1994, Petitioner filed *Plaintiff's memorandum in opposition to Defendants' motion to dismiss*, in 13 pages plus 13 pages of exhibits, to the effect that Petitioner had alleged properly in the original *Complaint* the three elements of a cause of action under *42 USC §1983:* that (1) some person has deprived the plaintiff of a federal right; (2) the person who has deprived the plaintiff of that right acted under color of state or territorial law; and (3) that state remedies are inadequate, attacking the state's corrective procedure as well as the substantive wrong.

4. In the July 8, 1994, hearing, by *order* entered July 8, 1994, the trial judge granted the Defendants' *motion to dismiss*, dismissed the action, based on the Court's verbal finding that there was no defendants' action "under color of state law," even though Petitioner's *Complaint* alleges such; and granted leave for Petitioner to amend his *Complaint*, and to refile the amendment within 15 days.

5. On July 22, 1994, Petitioner Breedlove filed his *Amended Complaint*, dated July 22, 1994, expanding the allegations of "under color of state law:" (a) to delineate the sub-elements of the cause of action, specifically identifying the requirement for that sub-element by footnote, and (b) to tie each sub-element alleged to the specific corresponding sentence in the holding of *Lugar v. Edmondson Oil Co., supra*, quoted in the footnote.

6. On August 11, 1994, counsel for both Respondents Tysons Manor Homeowners Association and Charlotte M. Schow (one counsel representing both defendants) filed and mailed to Plaintiff a joint *motion to dismiss*, pursuant to Fed. R.

Civ. P. 12 (b) (6) of the *Federal Rules of Civil Procedure*, on the grounds that the *Amended Complaint* fails to state a claim on which relief can be granted. Concurrently, the same single counsel for both Respondents also filed and mailed to Petitioner *Defendants' memorandum of points and authorities in support of its motion to dismiss Plaintiff's Amended Complaint.* Respondents' counsel noticed the *motion to dismiss* for hearing on September 2, 1994, which Respondents' counsel rescheduled to September 9, 1994, at the request of Petitioner Breedlove, due to Petitioner Breedlove having the workload to submit a brief to the U.S. Supreme Court on August 30, 1994.

7. The primary focus of the Respondents' argument—that the *Amended Complaint* fails to state a cause of action—is the Respondents' assertion that they did not act "under color of state law."

a. In the original *Complaint*, Petitioner alleged that the Respondents acted under color of state law, to which the Respondents responded that they did not act under color of state law.

b. In the *Amended Complaint*, Petitioner has made detailed allegations concerning the subelements of the "under-color-of-state-law" element a cause of action under 42 USC §1983, consistent with *Lugar v. Edmondson Oil Co., supra.*

c. The Respondents' argument against the *Amended Complaint* in their August 11, 1994 *memorandum* supporting their *motion to dismiss* was a *denial*—that they did not act under color of state law—addressing the issue, not an argument that Petitioner had failed to state his case properly and apprise the Respondents of the case being brought against them. In their August 11, 1994 *memorandum*, the Respondents failed to traverse the Petitioner's detailed "under-color-of-state-law" allegations with their argument.

d. The Respondents' *memorandum* argued the general fact of whether they had acted under color of state law and not whether the Petitioner had alleged that Respondents acted under color of state law.

e. The Respondents' arguments clearly demonstrated that they understood the nature of the case being brought

against them in the Petitioner's allegations, which is the purpose of the allegations.

8. Had the Respondents traversed the Petitioner's detailed "under-color-of-state-law" allegations and sub-allegations with their argument, it would have permitted the Court to isolate easily the Respondents' disagreement with the Petitioner's allegations. Instead, the Respondents relied on a general assertion that they did not act "under color of state law." Thus, the Respondents denied the factual issue not the properness of the allegations.

9. On August 31, 1994, Petitioner filed his *affidavit* in support of his *Amended Complaint*, and in opposition to Respondents' *motion to dismiss*, a dispositive motion, which motion was received by the Petitioner on August 14, 1994. Despite the short 15-day time limit for filing an *affidavit* imposed on *pro se* plaintiffs under local rule of court 11 (m), notice of which rule counsel for the Respondents sent to Petitioner by mail, dated August 11, 1994, accompanying the Respondents' August 11, 1994 *motion to dismiss*, which would make the *affidavit* due August 29, 1994, Petitioner filed *Plaintiff's Motion for Extension of Time*, dated August 31, 1994, accompanied by his *affidavit*, praying that his *affidavit* be accepted as timely by the Court. This motion was noticed by *praecipe and notice*, dated September 3, 1994, for hearing September 9, 1994.

10. On September 2, 1994, Petitioner filed *Plaintiff's Motion for Written, Self-Contained Memorandum of the Court's Findings, Rulings, and Decision*, dated September 2, 1994, and noticed that motion for hearing on September 9, 1994, in *praecipe and notice* dated September 2, 1994.

11. a. On September 3, 1994, Petitioner filed *Plaintiff's memorandum in opposition to Defendants' motion to dismiss Plaintiff's Amended Complaint*, in 13 pages, to the effect that Plaintiff had alleged properly the three elements of a cause of action under *42 USC §1983:* that (1) some person has deprived the plaintiff of a federal right (**see** *Amended Complaint*, paragraphs 16 – 20, reproduced as Appendix Exhibit 5); (2) the person who has deprived the plaintiff of that right acted under color of state or territorial law; (**see** *Amended Complaint*,

paragraphs 21 – 27 d, reproduced as Appendix Exhibit 6); and (3) that state remedies are inadequate, attacking the state's corrective procedure as well as the substantive wrong (**see** *Amended Complaint*, paragraphs 32 – 32 c, reproduced as Appendix Exhibit 8). Furthermore, Petitioner pleaded in the *Amended Complaint* and argued in his *memorandum in opposition* that the state law invoked by the Respondents with the assistance of state officials is unconstitutional (**see** the *Amended Complaint*, paragraphs 28 – 31, reproduced as Appendix Exhibit 7).

b. The Petitioner's various allegations—both in the *Amended Complaint* and in the above-cited paragraphs quoted from the *Amended Complaint* in *Plaintiff's memorandum in opposition to Defendants' motion to dismiss Plaintiff's Amended Complaint*—are crossreferenced to corresponding legal concepts in *Lugar v. Edmondson Oil Company, supra*. This cross-referencing in the *Amended Complaint* is accomplished by footnotes containing the sentences, and accompanying page citations, quoted from *Lugar, supra*, setting forth each corresponding legal concept.

c. In *Plaintiff's memorandum in opposition to Defendants' motion to dismiss Plaintiff's Amended Complaint*, Petitioner presented arguments refuting Respondents' assertion that a "private individual does not act under color of state law by merely invoking state law," citing specific allegations in the *Amended Complaint* to the effect that the Defendants: (1) ignored providing prior notice as required by Virginia POA lien law; (2) failed to comply with Virginia POA lien law for the creation of liens; and (3) demonstrated a recurring pattern of conduct.

12. a. In hearing on September 9, 1994, Petitioner raised the question in open court of whether the Court could hear this matter on that day because the Attorney General of Virginia had not been notified of the hearing and the matter called into question the constitutionality the Virginia Property Owners Association lien law.[4] The Court by-passed that question,

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[4] The relevant oral proceedings in the September 9, 1994, hearing are set forth below, quoted from the transcript, which is reproduced in its entirety in Petitioner's *Reply Brief for the Appellant*, dated December 1, 1994, at pages A3-A19.

without ruling *de jure*. The Court's ruling to dismiss the action was a *de facto* ruling on this question. Furthermore, the trial judge overruled Petitioner's verbal question to the trial judge in open court as to whether it was proper for the Court to hear the matter on that day, pursuant to *28 USC §2403 (b)*, in that the Attorney General of Virginia had not been notified of the hearing and the constitutionality of a Virginia statute was being challenged.

b. In hearing on September 9, 1994, the Court ruled verbally: (a) that *Plaintiff's Motion for Extension of Time*, dated August 31, 1994, was denied, and (b) that *Plaintiff's Motion for Written, Self-Contained Memorandum of the Court's Findings, Rulings, and Decision*, dated September 2, 1994, was denied also. These rulings of the Court were never committed to written orders and entered, prior to or subsequent to the Court's *order* of September 9, 1994, dismissing the action.

c. In the September 9, 1994, hearing, by *order* entered September 9, 1994, the trial judge granted the Respondents' *Motion to Dismiss Plaintiff's Amended Complaint*, dated August 11, 1994, which sought dismissal with prejudice.[5] The Septem-

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"MR. BREEDLOVE: All right. One other item, Your Honor. As I had to prepare the memorandum in opposition to the defendants' motion and that got into substantial discussion of the unconsitutionality allegations of the Virginia statute, I'm asking now whether this Court can today hear this motion. That particular citation being the requirement that whenever a state statute is challenged, that the state's Attorney General be notified. And as yet I have not done that. And it became questionable in my mind as I prepared that memorandum and the degree to which it was evident that this case has to challenge the state's Constitution, the law, the constitutionality of the state's law, it then seemed to me that perhaps that provision of the federal code was invoked. And without that notification to the Attorney General, I'm asking whether this Court can hear that question.

"THE COURT: Well, let me go ahead and hear the motion and you can raise that in whatever argument you want in opposition to their motion." [excerpt from *transcript* of oral proceedings of September 9, 1994, hearing, at internal page 5, lines 7 - 25, and internal page 6, lien 1, reproduced in the *Reply Brief for the Appellant*, dated December 1, 1994, at pages A7-A8.]

The trial judge failed subsequently to return to this question in the oral proceedings or to address the matter of 28 USC §2403 (b) in the written *dismissal order* of September 9, 1994.

[5] The relevant oral proceedings in the September 9, 1994, hearing are set forth below, quoted from the *transcript*, which is reproduced in its entirety in Petitioner's *Reply Brief for the Appellant*, dated December 1, 1994, at pages A3-A19.

ber 9, 1994 *order* is an order memorializing the final judgment of the Court.[6]

13 On October 7, 1994, Petitioner filed his *notice of appeal* with the District Court, pursuant to Fed. R. App. P. 3 (a) of the *Federal Rules of Appellate Procedure*; within 30 days of the District Court's September 9, 1994 judgment, in accordance with Fed. R. App. P. 4 (a); paid the applicable fees to the Clerk of the District Court, in accordance with Fed. R. App. P. 3 (e); and served copies of the *notice of appeal*, in accordance with Fed. R. App. P. 3 (d) of the *Federal Rules of Appellate Procedure*.

14. On October 14, 1994, Petitioner filed his *transcript order* with the District Court, within 10 days of the *notice of appeal*.

15. On October 19, 1994, Petitioner filed his *docketing statement* with the U. S. Court of Appeals for the Fourth Circuit, within 14 days of the *notice of appeal*.

16. November 4, 1994, Petitioner filed his *Brief for the Appellant* timely with the Fourth Circuit court of appeals, within 60 days of the September 9, 1994, *dismissal order*.

"THE COURT: All right. Well, I understand your position, but I believe, Mr. Breedlove that your reliance on *Lugar* and those cases decided under it is a bit misplaced. This simple recording of a lien, which is a ministerial act required by law for the clerk to do, just simply isn't the state action that Lugar is talking about.

"And I find that there is still no state action alleged in this amended complaint. I am going to grant the defendants' motion to dismiss. However, any state claims which may be stated in this complaint will be dismissed without prejudice and you are free to pursue whatever constitutional challenges or whatever actions you may have in the state courts to deal with the problem. They will be dismissed without prejudice." [excerpt from *transcript* of oral proceedings of September 9, 1994, hearing, at internal page 15, lines 2 - 15, reproduced in the *Reply Brief for the Appellant*, dated December 1, 1994, at page A17.]

[6] See copy of the September 9, 1994, *dismissal order* of the federal district court reproduced herein as Appendix Exhibit 4, *post*.

Exhibit 4 Trial court order on* motion to dismiss, *appealed to Fourth Circuit court of appeals

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

KENDALL H. BREEDLOVE,	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
	)	NO. 94-0647-A
TYSONS MANOR HOMEOWNERS	)	
ASSOCIATION,	)	
CHARLOTTE M. SCHOW,	)	
JOE DOE,	)	
	)	
Defendants.	)	

ORDER

This matter came before the Court on the defendants' motion to dismiss. For reasons stated from the bench, it is hereby[7]

ORDERED that the defendants' motion to dismiss is GRANTED; however, any state claims or allegations contained in the complaint are DISMISSED, without prejudice.

Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
September 9, 1994

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[7] For the trial judge's reasons, see excerpt from *transcript* of oral proceedings of September 9, 1994, hearing, at internal page 15, lines 2 – 15, reproduced herein in Appendix Exhibit 3, footnote 5, *ante*.

***Exhibit 5 Paragraphs 16 – 20 of* Amended Complaint**

The following paragraphs are quoted from the *Amended Complaint*:

"Defendants deprived Plaintiff of federally-protected rights—

"16. On May 19, 1993, Defendants Tysons Manor HOA and Charlotte M. Schow, acting as Treasurer of the Association, and John Doe, acting jointly, deprived the Plaintiff of significant rights and interests, protected under the Fourteenth Amendment of the Constitution of the United States and under Article I, §11, of the Constitution of Virginia, in that Defendants did file a lien, naming Plaintiff Breedlove therein as lienee, under the unconstitutional Virginia Property Owners Association lien statute, Virginia Code (1950), as amended, §55-516, as ancillary process for prejudgment attachment, filed without Due Process—without notice and without opportunity to be heard—subsequent to the filing of a judicial process of a warrant in debt.

"Liberty interest deprivation—

"a. The liberty interest which Defendants' actions invaded and of which Defendants deprived the Plainitff is Plaintiff's entitlement to his good name, reputation, and creditworthiness, to which he is entitled under the Constitutions of the United States and Virginia, which was coupled with the Plaintiff being deprived of freedom of occupation, in that when the false, libelous, malicious, unconstitutional May 19, 1993 POA lien disparaged Plaintiff's good name, reputation, and creditworthiness in the public land records, that lien stigmatized Plaintiff in his trade, business and profession of purchasing, owning, operating, and selling rental and other real estate investment properties which business depends on the extension of large amounts of credit to Plaintiff. The damage done to Plaintiff's creditworthiness caused Plaintiff to abandon his business, which he

had pursued since 1983. The damage will persist indefinitely into the future and has effectively precluded Plaintiff from ever pursuing this occupation again.

"b. The fact that the May 19th lien was released of record itself contributes to the damage to Plaintiff's reputation and credit worthiness, making it appear in the public records that Plaintiff had to be liened for a debt and, subsequently, settled or compromised that debt. Only when the invalid May 19th lien is removed from record by court order will the libel begin to be healed.

"*Due Process deprivation—*

"c. Defendants Tysons Manor HOA and Charlotte M. Schow, acting as Treasurer of the Association, and John Doe, acting jointly, deprived the Plaintiff of his right to Due Process, protected under the Fourteenth Amendment of the Constitution of the United States and under Article I, §11, of the Constitution of Virginia, in that:

"(1) Defendants did not provide predeprivation notice to Plaintiff of filing the May 19th lien; and

"(2) Defendants did not provide predeprivation hearing or a postdeprivation hearing to Plaintiff, wherein he might have contested the May 19th lien.

"(3) Defendants filed the May 19th lien as an ancillary process, for prejudgment attachment, subsequent to filing a judicial process of a warrant in debt.

"(4) Defendants did not make a showing of exigent circumstances and did not post a bond to protect the lienee from damages occasioned by erroneous deprivation.

"17. Defendants did not provide Plaintiff with prior notice of lien filing and they did not provide Plaintiff an opportunity to be heard before an impartial tribunal before Plaintiff was deprived of a significant constitutionally-protected interest—his liberty interest—

by the Defendants filing the May 19th lien, naming Plaintiff therein, as named lienee.

"18. Defendants' use of the unconstitutional POA lien statute lacked Due Process, in that Defendants employed the May 19th lien, as ancillary process, for prejudgment attachment, without notice or an opportunity to be heard. Defendants made no attempt to bring the actual property owner into court.

" *Equal Protection deprivation—*

"19. Defendants Tysons Manor HOA and Charlotte M. Schow, acting as Treasurer of the Association, and John Doe, acting jointly, deprived the Plaintiff of his right to Equal Protection under law, protected under the Fourteenth Amendment of the Constitution of the United States and under Article I, §11, of the Constitution of Virginia, in that Defendants did not comply with the unconstitutional Virginia Code (1950), as amended, §55-516, which they invoked for the creation of the May 19th lien.

"20. Defendants did not comply with the unconstitutional Virginia Code (1950), as amended, §55-516, for the creation of liens and thereby deprived Plaintiff of Equal Protection under law, in that Plaintiff is entitled to having any lien against him being in full compliance with the law creating such lien." [*Amended Complaint*, paragraphs 16 – 20, pages 4-6.]

*Exhibit 6 **Paragraphs 21 – 27 d of*** **Amended Complaint**
(footnotes are quoted from *Amended Complaint* also.)

The following paragraphs are quoted from the *Amended Complaint*:

"Defendants acted under color of state law—

"21. Defendants Tysons Manor HOA and Charlotte M. Schow, acting as Treasurer of the Association, and John Doe, acting jointly, caused this deprivation of Plaintiff's federally-protected rights,

privileges, and immunities under color of unconstitutional state law in that the Defendants caused to be recorded in the land records of Fairfax County, Virginia, in Deed Book 8562, at Pages 1862 – 1865, a "Memorandum of Lien," dated April 28, 1993, claiming under unconstitutional Virginia Code (1950), as amended, §55-516, naming Plaintiff Breedlove therein as named lienee, against property formerly owned by Plaintiff, identified as lot #32, Tysons Manor, commonly known as 8149 Larkin Lane, Vienna, Virginia, 22182—the Larkin Lane property—which lien was in the amount of $2,043.90, for two years of home owners association dues and other charges the association claimed against Plaintiff Breedlove.

"22. The actions of the Defendants are fairly attributable to the State of Virginia. **See** *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 73 L.Ed.2d 482, at 495, 102 S.Ct. 2744 (1982).[8]

"23. The Defendants caused the Plaintiff to be deprived of one or more constitutionally-protected rights or entitlements by the Defendants' exercise of the right or privilege created by the Commonwealth of Virginia in unconstitutional Virginia Code §55-516, to create liens for Property Owners Association dues and assessments. **See** *Lugar v. Edmondson Oil Co., id.*, at 495.[9]

"24. The Defendants are parties who may fairly be said to be state actors, in that they acted together with or obtained significant aid from state officials. **See** *Lugar, supra*, at 495.[10]

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[8] "Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of 'fair attribution.'" [*Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 73 L.Ed.2d 482, at 495, 102 S.Ct. 2744 (1982).]

[9] "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." [*Lugar v. Edmondson Oil Co.*, 457 *supra, id.*, at 495.]

[10] "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official,

"Deprivation caused by Defendants' exercise of right or privilege created by the state—

"25. Defendants employed the unconstitutional Virginia statutory procedure (*Virginia Code §55-514* through *§55-516*) for the creation of POA liens to create the May 19, 1993 memorandum of lien, in pursuit of their exercise of their rights or privileges created by the unconstitutional Virginia POA lien law, which on its face is procedurally defective under the Fourteenth Amendment. **See** *Lugar, supra*, at 497.[11]

"26. The unconstitutional procedural scheme for the creation of POA liens under *Virginia Code §55-514* through *§55-516* is the product of state action. **See** *Lugar, supra*, at 498.[12]

"The Defendants, as parties charged with the deprivation, may fairly be said to be state actors—

"27. The Defendants caused the May 19, 1993 memorandum of lien to be admitted to record as a lien through the direct action, participation, and assistance of

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because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." [*Lugar v. Edmondson Oil Co., supra, id.*, at 495.]

11 "*Lugar* consisted of two counts. Count I contained a challenge to the constitutionality of the statute providing prejudgment attachment. Count II alleged only misuse or abuse of the statute, without challenging its constitutionality. Count II was dismissed. Count I was held by the United States Supreme Court to state a valid cause of action under 42 USC §1983. In this regard, the Court stated:

> "Count one is a different matter. That count describes the procedures followed by respondents in obtaining the prejudgment attachment as well as the fact that the state court subsequently ordered the attachment dismissed because respondents had not met their burden under state law. Petitioner then summarily states that this sequence of events deprived him of his property without due process. Although it is not clear whether petitioner is referring to the state-created procedure or the misuse of that procedure by respondents, we agree with the lower courts that the better reading of the complaint is that petitioner challenges the state statute as procedurally defective under the Fourteenth Amendment." [*Lugar v. Edmondson Oil Co., supra, id.*, at 497-498.]

12 "While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute is the product of state action. This is subject to constitutional restraints and properly may be addressed in a §1983 action, if the second element of the state-action requirement is met as well." [*Lugar v. Edmondson Oil Co., supra, id.*, at 498.]

an official of the Commonwealth of Virginia—the Clerk of the Circuit Court of Fairfax County, thus characterizing the Defendants, although private parties, as state actors for purposes of the Fourteenth Amendment of the United States Constitution. **See** *Lugar, supra*, at 498.[13]

"a. The Defendants participated jointly with state officials—the Clerk of the Fairfax Circuit Court and his employees—in the creation of the May 19, 1993 POA lien.

"b. The Defendants obtained significant aid from the Clerk of the Circuit Court of Fairfax County—as Recorder of Deeds—in that the Clerk of the Circuit Court, through his employees, affixed his official indicia of recording and attestation to the May 19th lien, admitting it to record, and thereby completed the attachment of the lien, depriving Plaintiff of his federal rights, without Due Process.

"c. The Defendants were willful participants in the joint activity of creating the May 19, 1993 POA lien with the State or its agents. **See** *United States v. Price*, 383 US, at 794, 16 L Ed 2d 267, 86 S Ct 1152, as quoted in Lugar, supra, at 498.[14]

"d. It is the construction and meaning of 42 USC §1983, as interpreted by the United States Supreme Court holding in *Lugar, supra*, that:

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[13] "As is clear from the discussion in Part II, we have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment. The rule in these cases is the same as that articulated in Adickes v. S.H. Kress & Co., supra, at 152, 26 L Ed 2d 142, 90 S Ct 1598, in the context of an equal protection deprivation:

> "'Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.'" quoting United States v. Price, 383 US, at 794, 16 L Ed 2d 267, 86 S Ct 1152.'" [*Lugar v. Edmondson Oil Co., supra, id.*, at 498.]

[14] "*ibid.*"

"'In the context of a due-process deprivation, a private party's invoking the aid of state officials to take advantage of unconstitutional, state-created, attachment procedures is sufficient, without more, to constitute a person acting "under color" of law for purposes of 42 USC §1983 (satisfying the second part of the "fair attribution" test), when the State has created an unconstitutional system whereby State officials will attach property on the ex parte application of one party to a private dispute (satisfying the first part of the "fair attribution" test).'" [*Amended Complaint*, paragraphs 21 – 27 d, pages 6-8.]

***Exhibit 7 Paragraphs 28 – 31 of* Amended Complaint**

(footnotes are quoted from *Amended Complaint* also.)

The following paragraphs are quoted from the *Amended Complaint*:

"Valid 42 USC §1983 cause of action under color of state law requires constitutional challenge of that law—

"28. Plaintiff challenges herein the constitutionality of the Virginia POA lien law (*Virginia Code §55-514* through *§55-516*), on its face, because the Defendants invoked these unconstitutional statutes by their actions in filing the May 19th lien. **See** *Lugar, supra*, at 498.[15]

"29. The constitutional defects of the Virginia POA lien law are set forth herein in detail. The unconstitutional Virginia Property Owners' Association (hereinafter POA) lien statute (i.e., *Virginia Code §55-516*) on its face, does not provide adequate provisions for safeguarding the Due Process protections guaranteed by the Fourteenth Amendment of the United States Constitution and by Article I, § 11, of the Virginia

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[15] "In summary, petitioner was deprived of his property through state action; respondents were, therefore, acting under color of state law in participating in that deprivation. Petitioner did present a valid cause of action under §1983 insofar as he challenged the constitutionality of the Virginia statute [*in Lugar Count I*]; he did not insofar as he alleged *only* misuse or abuse of the statute [*in Lugar Count II*]." [*Lugar v. Edmondson Oil Co., supra, id.*, at 498-499.]

Constitution. Particularly lacking are the following protections:

"a. The unconstitutional Virginia POA lien statute does not provide for a predeprivation hearing;

"b. Although the unconstitutional Virginia POA lien statute provides for 10-days-prior notice of intent to file lien, the statute requires no show of evidence of such notice being given prior to a lien attaching;

"c. The unconstitutional Virginia POA lien statute does not provide for notice of the filing of a lien to be served upon the property owner concurrent with the lien's filing. The lien lies there of record, in ambush, like a "booby trap," for up to two years, waiting to be uncovered at the time of a title search in conjunction with a sale or refinancing of the property, at which time the property owner would have the least possible opportunity to take effective countermeasures to defeat a false or erroneous lien, if there were any statutory means available to controvert the lien, which there are not.

"d. The unconstitutional Virginia POA lien statute deprives an owner of the unrestricted use and full enjoyment of his property for an unreasonably long time. From the date the lien is filed, the lienor has two years in which to bring suit to enforce the lien; to that two years, add the time to adjudicate the suit to enforce the lien—during all of which time period the owner cannot free his property from the effects of that POA lien.

"e. The unconstitutional Virginia POA lien statute does not provide for an early postdeprivation hearing;

"f. The unconstitutional Virginia POA lien statute does not provide for any form of hearing on the validity of the lien. The property owner can only challenge the lien in a trial on the merits to foreclose the lien, only after suit to enforce the lien has been brought in a court of equity, after any dilatory tactics of the lienor, and in the normal course of the trial court's docket.

"g. The unconstitutional Virginia POA lien statute does not provide a requirement that the lienor post a bond to protect the lienee against damages resulting from erroneous deprivation by erroneous, false, or fraudulent lien. There is no adequate, economically-feasible method for redress for damages suffered by lienee as a result of erroneous, or false, or fraudulent, or libelous liens.

"h. The unconstitutional Virginia POA lien statute does not provide that the property owner may free his property from the lien and from custodia legis by posting a bond;

"i. The unconstitutional Virginia POA lien statute does not provide that the lien be issued under the supervision of a judge but, rather, provides that the recording of the lien is a ministerial function of a clerical employee in the Office of the Clerk of the Circuit Court, who admits the lien to record by endorsing the lien memorandum with the official indicia and attestation of the Clerk, and the date of filing. Note that in the instant May 19th lien, scrutiny by a judge likely would have caught the failures of notice, lienee name, and amount claimed.

"j. The unconstitutional Virginia POA lien statute does not provide that the affidavit contain sufficient substantive facts underlying conclusory allegations of the debt alleged, on which a judge could make a meaningful determination, even if such judge were to see the memorandum of lien prior to the lien attaching.

"k. The unconstitutional Virginia POA lien statute does not provide that the lien must name only the property owner of record to be valid, and that the lienor has the burden of determining the correct name and address of the record owner from the public records, in accordance with *Wallace v. Brumback, supra.*

"30. The Commonwealth of Virginia has created an unconstitutional and procedurally-defective system, under *Virginia Code §55-514* through *§55-516*,

whereby state officials will lien property on the ex parte application of one party to a private dispute. **See** *Lugar, supra*, at 498.[16]

"31. Defendants deprived Plaintiff of constitutionally-protected interests and entitlements through state action and Defendants were, therefore, acting under color of unconstitutional state law in participating in that deprivation, (**see** *Lugar, supra*, at 498) which circumstances constitute a valid cause of action under 42 USC §1983[17], in that Plaintiff has challenged herein the consitutionality of the Virginia POA lien law (*Virginia Code §55-514* through *§55-516*), on its face, which the Defendants employed in their actions. **See** *Lugar, supra*, at 498-499." [*Amended Complaint*, paragraphs 28 – 31, pages 9-10.]

***Exhibit 8 Paragraphs 32 – 32 c of* Amended Complaint**

The following paragraphs are quoted from the *Amended Complaint*:

" *State remedies for redress are inadequate—*

" 32. Virginia state remedies for redressing the harm herein complained of are inadequate, in that:

" a. The unconstitutional Virginia Property Owners Association Act, particularly *Virginia Code §55-514* through *§55-516*, prescribes no requirement for a lienor to post a bond, prior to liening property, to compensate a lienee harmed improperly for damage as a consequence of the lien.

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16 "Whatever may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute." [*Lugar v. Edmondson Oil Co., supra, id.*, at 498.]

17 "In summary, petitioner was deprived of his property through state action; respondents were, therefore, acting under color of state law in participating in that deprivation. Petitioner did present a valid cause of action under §1983 insofar as he challenged the constitutionality of the Virginia statute [*in Lugar Count I*]; he did not insofar as he alleged *only* misuse or abuse of the statute [*in Lugar Count II*]." [*Lugar v. Edmondson Oil Co., supra, id.*, at 498-499.]

" b. There are no effective avenues within the Commonwealth of Virginia for redress for one deprived of constitutionally-protected rights and interests, or for one libeled or defamed or whose title is slandered by a false, erroneous, or fraudulent POA lien.

" (1) Any action for libel or defamation of title would meet with a *demurrer* filed by the lienor, based upon *Donohoe Constr. Corp. v. Mount Vernon Assoc.*, 235 Va. 531, 369 S.E.2d 857 (1988), claiming absolute privilege for a POA lien as a judicial action equivalent to a mechanics' lien.

" (2) Any avenues of redress for malicious prosecution or abuse of process would be blocked by the English rule, with the lienor claiming that the filing of a POA lien does not satisfy the English rule. Further, such avenues are impracticable for being far more costly to pursue than a plaintiff could hope to recover.

" c. The unconstitutional Virginia Property Owners Association Act, particularly *Virginia Code §55-514* through *§55-516*, prescribes no procedure by which the lienee can controvert the validity of the lien and no procedure by which the lienee may have false liens *removed* from record (not merely released of record)." [*Amended Complaint*, paragraphs 32 – 32 c, page 11.]

Exhibit 9 Excerpt from* transcript *of the oral proceedings of September 9, 1994, hearing, regarding " state action"

1. The relevant oral proceedings in the September 9, 1994, hearing are set forth below, quoted from the *transcript*, which is reproduced in its entirety in Petitioner's *Reply Brief for the Appellant*, dated December 1, 1994, at pages A3-A19.

a. "THE COURT: Well, I understand that. The problem you have got is state action though. Where is the state action?"

b. "MR. BREEDLOVE: Yes, if I may, Your Honor. *Lugar versus Edmondson Oil Company* sets forth that in circumstances of prejudgment attachment

and the allegations of unconstitutionality of a state statute, that the only requirements for state action, for the defendants to be determined state actors is that they invoked the state law.

c. "And the defendants' arguments parallel the arguments that were made by the respondent in *Lugar versus Edmondson Oil* which were first upheld by the District Court, next upheld by the Fourth Circuit Court of Appeals, but specifically and explicitly reversed by the United States Supreme Court with a particular note that the Fourth Circuit Court of Appeals was erroneous in its opinion.

d. "And the Supreme Court said in *Lugar*, the Court of Appeals, that is from the Fourth Circuit, erred in holding that in this context joint participation required something more than invoking the aid of state officials to take advantage of state created attachment procedures. That holding is contrary to the conclusions we have reached as to the applicability of due process standards to such procedures. Whatever may be true in other contexts, this is sufficient when the state has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute. In summary, petitioner was deprived of his property through state action. Respondents were, therefore, acting under color of state law in participating in that deprivation.

e. "If I may also, Your Honor, draw your attention to the Fifth Circuit *Folsom Investment Company, Incorporated versus Moore*, where the Court of Appeals said that the Supreme Court reversed the Fourth Circuit in *Lugar* and held that when a Section 1983 plaintiff challenges the constitutionality of a state attachment procedure as opposed to making mere nonconstitutional allegations of misuse or abuse of the statute, the private party who sets that attachment scheme in motion is to be considered a state actor. Citations there.

f. "So, insofar as Folsom and the Scullins have alleged that the Louisiana attachment scheme is violative

of the Constitution, the private parties who set that scheme in motion acted under color of state law. And that's *Folsom versus Moore*, 681 F.2d 1032, at 1037, Fifth Circuit, 1982.

g. "The Mississippi District Court, having quoted that exact paragraph in the case of *Lomax versus Davis*, went on to say the same is true of any state statute or procedure used by a private party to deprive an individual of his civil rights.

h. "In my amended complaint I have alleged the unconstitutionality of the state statute. I have alleged that the lien was used for prejudgment attachment. And I stand ready by evidence to prove that allegation. I have alleged that the--"

i. "THE COURT: But they didn't attach anything. In fact, they didn't even get it on your property from what you tell me."

j. "MR. BREEDLOVE: Your Honor, the question of whether or not a property or my property was attached is one of the questions of whether or not my civil rights have been violated. The others involve liberty interest, they involve the deprivation of due process, they involve the deprivation of equal protection under law. Whether or not those occurred are questions of fact. And I would submit that to make any decision on them would be to invade the prerogatives of the jury to determine questions of fact.

k. "I believe that it is appropriate that this case proceed forward toward jury trial, that it may be tried before a jury and the results to come forth as they may."

l. "THE COURT: All right. Well, I understand your position, but I believe, Mr. Breedlove that your reliance on *Lugar* and those cases decided under it is a bit misplaced. This simple recording of a lien, which is a ministerial act required by law for the clerk to do, just simply isn't the state action that *Lugar* is talking about.

m "And I find that there is still no state action alleged in this amended complaint. I am going to grant the defendants' motion to dismiss. However, any state claims which may be stated in this complaint will be dismissed without prejudice and you are free to pursue whatever constitutional challenges or whatever actions you may have in the state courts to deal with the problem. They will be dismissed without prejudice."

[excerpt from *transcript* of oral proceedings of September 9, 1994, hearing, at internal page 12, lines 7 - 25, internal page 13, internal page 14, and internal page 15, lines 1 - 15; the *transcript* is reproduced in its entirety in the *Reply Brief for the Appellant*, dated December 1, 1994, at pages A3-A19.]

Exhibit 10 Excerpt from Reply Brief for the Appellant, showing comparison of Petitioner's allegations in Amended Complaint with trial judge's September 9, 1994 verbal findings and ruling

I. *Trial Judge Ignored Applicability of* Lugar v. Edmondson Oil Co.,[18] *and Ruled Contrary to U. S. Supreme Court's Holding Therein, in Two Aspects—*

First—

1. The trial judge erroneously reached, apparently, a conclusion of fact—that there was no prejudgment attachment—despite Plaintiff having alleged in his *Amended Complaint* that Defendants filed the May 19, 1993 Property Owners Association (POA) lien as ancillary process, for prejudgment attachment, and that the May 19th POA lien seized and held the liened property in *custodia legis* for 202 days. **See** details of Plaintiff's factual allegations in paragraphs 36 and 37 of the *Amended Complaint*, which are discussed later in this *reply brief* at paragraph III. 10, on page 9.

2. The trial judge concluded, apparently as a matter of fact, that no attachment occurred. The trial judge did not state this conclusion as a finding, however. **See** *transcript*, internal

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[18] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 73 L.Ed.2d 482, 102 S.Ct. 2744 (1982).

page 14, lines 12-14, in Appendix Exhibit 1, at page A-16. The trial judge did not conclude that Plaintiff failed to allege attachment, seizure, and holding of the property. On the basis of the trial judge's factual conclusion, the trial judge ruled that Plaintiff may not rely on *Lugar, supra.* This is error.

Second—

3. The trial judge went on to rule that the Defendants' actions (alleged in detail in Plaintiff's *Amended Complaint* with each sub-element of "under color of state law" alleged consistent with *Lugar* and footnoted by the Plaintiff in the *Amended Complaint* to the corresponding sentence of *Lugar*) did not correspond with the circumstances on which the United States Supreme Court based its holding in *Lugar, supra.*

4. The Plaintiff's allegations in the *Amended Complaint,* the footnotes of the *Amended Complaint* quoting *Lugar,* and the trial judge's ruling are presented for comparison below, in two columns:

Amended Complaint Allegations	Trial Judge's Ruling
"*The Defendants, as parties charged with the deprivation, may fairly be said to be state actors—* "27. The Defendants caused the May 19, 1993 memorandum of lien to be admitted to record as a lien through the direct action, participation, and assistance of an official of the Commonwealth of Virginia—the Clerk of the Circuit Court of Fairfax County, thus characterizing the Defendants, although private parties, as state actors for purposes of the Fourteenth Amendment of the United States Constitution. See *Lugar, supra,* at 498.[1]" [Footnote 1 below is quoted from footnote 1, page 8, of the *Amended Complaint.*][19]	"This simple recording of a lien, which is a ministerial act required by law for the clerk to do, just simply isn't the state action that *Lugar* is talking about." [*Transcript,* internal page 15, lines 5 - 7, Appendix Exhibit 1, page A-17.]

19 "1 'As is clear from the discussion in Part II, we have consistently held that a private party's joint participation with state officials in the seizure of

Amended Complaint Allegations	Trial Judge's Ruling
"a. The Defendants participated jointly with state officials—the Clerk of the Fairfax Circuit Court and his employees—in the creation of the May 19, 1993 POA lien.	
"b. The Defendants obtained significant aid from the Clerk of the Circuit Court of Fairfax County—as Recorder of Deeds — in that the Clerk of the Circuit Court, through his employees, affixed his official indicia of recording and attestation to the May 19th lien, admitting it to record, and thereby completed the attachment of the lien, depriving Plaintiff of his federal rights, without Due Process.	
"c. The Defendants were willful participants in the joint activity of creating the May 19, 1993 POA lien with the State or its agents. See *United States v. Price*, 383 US, at 794, 16 L Ed 2d 267, 86 S Ct 1152, as quoted in *Lugar, supra*, at 498.[2]" [Footnote 1 below is quoted from footnote 2, page 8, of the *Amended Complaint*.][20]	"And I find that there is still no state action alleged in this amended complaint." [*Transcript*, internal page 15, lines 8 - 9, Appendix Exhibit 1, page A-17.]

5. Note that allegation paragraph 27 b, above, says "...depriving Plaintiff of his federal rights, without Due Process," ***not*** "...depriving Plaintiff of his *property* rights, ..."

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disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment. The rule in these cases is the same as that articulated in Adickes v. S.H. Kress & Co., supra, at 152, 26 L Ed 2d 142, 90 S Ct 1598, in the context of an equal protection deprivation:

> "'"Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents."' quoting United States v. Price, 383 US, at 794, 16 L Ed 2d 267, 86 S Ct 1152.'" [*Lugar v. Edmondson Oil Co., supra, id.*, at 498.]"

20 "2 *ibid.*"

6. Despite the Plaintiff alleging the factual subelements of "under color of state law" in the *Amended Complaint,* in a manner consistent with *Lugar, supra,* the trial judge ruled in law that those elements do not constitute state action. This ruling is error.

* * * * *

[III.] 8. The Plaintiff's allegations in the *Amended Complaint,* the footnotes of the *Amended Complaint* quoting *Lugar,* and the trial judge's ruling are presented for comparison in two columns, on the following page.

Amended Complaint Allegations	Trial Judge's Ruling
"16. On May 19, 1993, Defendants Tysons Manor HOA and Charlotte M. Schow, acting as Treasurer of the Association, and John Doe, acting jointly, deprived the Plaintiff of significant rights and interests, protected under the Fourteenth Amendment of the Constitution of the United States and under Article I, §11, of the Constitution of Virginia, in that Defendants did file a lien, naming Plaintiff Breedlove therein as lienee, under the unconstitutional Virginia Property Owners Association lien statute, Virginia Code (1950), as amended, §55-516, as ancillary process for prejudgment attachment, filed without Due Process—without notice and without opportunity to be heard—subsequent to the filing of a judicial process of a warrant in debt." [*Amended Complaint*, paragraph 16, reproduced in Appendix Exhibit 2 at page A-4 of the *Brief for the Appellant*.]	
[16. c] "(3) Defendants filed the May 19th lien as an ancillary process, for prejudgment attachment, subsequent to filing a judicial process of a warrant in debt." [*Amended Complaint*, paragraph 16 c (3), reproduced in Appendix Exhibit 2 at page A-4 of the *Brief for the Appellant*.]	"THE COURT: But they didn't attach anything. In fact, they didn't even get it on your property from what you tell me." [*Transcript*, internal page 14, lines 12-14, Appendix Exhibit 1, page A-16.][21]

[21] This statement flows from a discussion at internal page 9, lines 15-25, and internal page 10, lines 1-9, of the *Transcript*, that Breedlove, as a prior owner, was not the owner of the property at the time the Defendants liened the property, naming Breedlove as lienee—Breedlove having sold the property and recorded the deed to another owner in the public land records, prior to the filing of the May 19th POA lien. Despite this circumstance, the liened property was seized and held by the May 19th POA lien and the subsequent property owner could not free his property from the false May 19th POA lien, until he paid the Defendants the claimed amount and they filed a satisfaction and release.

9. The trial judge went outside the four corners of the *Amended Complaint* in reaching his ruling—that there was no attachment—despite Plaintiff's allegations of prejudgment attachment, seizure, and holding of the liened property, and despite the trial judge's early speech about taking the pleadings as true. **See** *transcript*, internal pages 3-4, in Appendix Exhibit 1, at pages A-5 – A-6 [*Reply Brief*]. In the *Amended Complaint*, Plaintiff has alleged prejudgment attachment in paragraphs 15, 16, 16 c (3), 18, 41, 56, 57, 59, 60, 60 a and 60 b, and 69 d, and has alleged seizure and holding at paragraphs 36 and 37.

Exhibit 13 Application of Updated Doehr-version of the Three-part Mathews Test[22]

A declaration of unconstitutionality should be granted because the Virginia property owners association lien law (*Virginia Code §55-514-* through *§55-516*) complained of fails to satisfy the *Doehr*-version, three-part *Mathews* test, set forth in *Connecticut v. Doehr*, 501 U.S. 1, 115 L.Ed.2d at 13.

1. In light of the tests of sufficiency of Due Process protection set forth in *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349, 89 S.Ct. 1820 (1969), *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972), *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974), *North Georgia Finishing v. Di-Chem, Inc.*, 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 719 (1975), *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976) and, most recently, *Connecticut v. Doehr, supra*, (1991), as to the circumstances when Due Process is required, and of *Mullane*

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[22] This application of the updated *Doehr*-version of the three-part *Mathews* test to the Virginia POA lien law is quoted from the *Brief for the Appellant* in *Ex Parte Kendall H. Breedlove, ex rel. Tysons Manor Homeowners Association v. Breedlove, ex rel. Sky Bryce Association, Inc. v. Breedlove*, (E.D. Va., file no. CA-94-639-A, dism'd [unpubl.], 1995; C.A.4, no. 95-1737). The May 17, 1994, *Complaint* address the Tysons Manor POA lien and two POA liens filed by another property owners' association—Sky Bryce Association, Inc.—against two other of Petitioner's properties. Also, that other action challenges the Virginia POA lien law, *on its face* and *by its application* in the particular POA liens and, consequently, this analysis addresses the unconstitutionality of the Virginia POA lien law, *on its face* and *by its application* in the particular POA liens; whereas, in the instant 42 USC §1983 suit, only the constitutionality of the Virginia POA lien law, *on its face*, is challanged.

v. Central Hanover Bank & Trust Co., 339 U.S. 825, 94 L.Ed. 865, 70 S.Ct. 652 (1950), and its progeny, as to the minimum Due Process required:

a. According to these citations, the Virginia Property Owner Association lien statutes, *on their face*, are repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution and of Article I, § 11, of the Virginia Constitution.

b. Furthermore, the unconstitutional Virginia POA lien law (*Virginia Code §55-514* through *§55-516*) fails to provide a rough parity of procedural burden on the lienor as on the lienee. For the procedural burden of $13.00 filing fee, and $1.00 notary fee, plus about one-half hour of time, a POA lienor can create a POA lien which the lienee cannot undo or dissolve by any cost or any effort. In a private dispute allegedly between debtor and creditor, such lopsided procedural favoritism by the State of Virginia of the lienor creditor over the rights of the lienee debtor, permitting prejudgment attachment without due process, is itself unconstitutional.

c. Further, the Constitution of Virginia, Article I, § 11, affords the Appellant another protectable interest—his *entitlement* to Equal Protection under law. The *ex relatu* plaintiffs' filing of the unconstitutional, unlawful (not in compliance with *Virginia Code §55-516* for the creation of liens) May 19, 1993 POA lien and the unconstitutional, unlawful (not in compliance with *Virginia Code §55-516* for the creation of liens) June 28, 1994, POA liens deprived the Appellant of this significant interest or *entitlement*—his *entitlement* to equal protection under law—by the filing of liens invoking, but not in compliance with, the unconstitutional *Virginia Code §55-516*, thus depriving Appellant of his equal protection under law.

4. a. In *Mathews v. Eldridge, supra*, cited with approval in *Doehr, supra*, the United States Supreme Court set forth a three-part judicial test for adequacy of due process protection,

in instances of *government-initiated* deprivation of protected rights.[23]

b. In *Connecticut v. Doehr, supra*, the *Mathews* test was updated to accommodate instances of private-party-initiated deprivation of protected rights.[24]

c. As measured against the updated, *Doehr*-version three-part *Mathews* test, **the Virginia property owners association lien law, on its face, and as applied in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, fails to satisfy the necessary specific dictates of due process**, in light of the holdings set forth in paragraph 1, above, and as made applicable to liens by the holding of *Connecticut v. Doehr, supra.*

5. Applying the updated, *Doehr*-version of the three-part *Mathews* test yields the following:

As to the Doehr-version of the first Mathews factor—

> **"...first, consideration of the private interest that will be affected by the prejudgment measure..."** [*Connecticut v. Doehr, id.*, at 13.]

As to the May 19, 1993, POA lien—

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[23] "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors; first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or subsititute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews v. Eldridge, id.*, at 33, id., at 334-335.]

[24] "For this type of case, therefore, the relevant inquiry requires, as in Mathews, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to Mathews, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or foregoing the added burden of providing greater protections." [*Connecticut v. Doehr, id.*, at 13.]

6. a. Two constitutionally-protected private interests of persons affected by the May 19, 1993, POA lien are involved: (1) a property interest and (2) a liberty interest. Underlying *ex relatu* plaintiff Tysons Manor Homeowners Association filed the May 19, 1993, POA lien against Appellant without Due Process notice and without predeprivation hearing, thus without Due Process to the lienee (the Appellant) and to the property owner, and deprived the lienee (the Appellant) and the property owner of two significant constitutionally-protected interests: (1) as a lien, by invading the property owner's property interest, and (2) as an unlawful, libelous lien, employed as ancillary process, by invading the lienee's (the Appellant's) liberty interest.

b. The false May 19, 1993 POA lien was filed against Appellant as named lienee, although Appellant was no longer the property owner of record, and deprived the Appellant, as *lienee*, of a significant, constitutionally-protected interest: by a libelous POA lien invading Appellant's liberty interest.

c. Appellant asserts that a Virginia property owners association lien is libelous if it is a false lien, for being unlawfully noncompliant with the statute for the creation of such liens (*Virginia Code §55-516*) and, as a consequence of such unlawful noncompliance with the Virginia property owners association lien law, wrongfully and maliciously exposes the POA lienee to scorn in the public records and places the lienee's creditworthiness at risk by filing such wrongful lien in the public records. An unlawful POA lien is libelous when it is employed as ancillary process, for prejudgment attachment, rather than as judicial process to confer the *in rem* jurisdiction of the court.

(1) The liberty interest which was invaded is *significant*: the liens libeled Appellant's good name, reputation, and credit-worthiness to which he is entitled under both the federal and state constitutions.

(2) The invasion of Appellant's liberty interest was coupled with the Appellant being deprived of freedom of occupation, in that when the false, libelous, malicious, unconstitutional May 19, 1993 POA lien disparaged Appellant's

good name, reputation, and creditworthiness in the public land records.

(3) The May 19, 1993, POA lien stigmatized Appellant in his trade, business and profession of purchasing, owning, operating, and selling rental and other real estate investment properties which business depends on the extension of large amounts of credit to Appellant.

(4) The damage done to Appellant's creditworthiness caused Appellant to abandon his business, which he had pursued since 1983. The damage will persist indefinitely into the future and has effectively precluded Appellant from ever pursuing this occupation again.

d. Previous federal due process cases, regarding liens, attachments, and other provisional remedies, have turned on questions of the property interest being invaded. In the instant appeal, another equally important protected interest—the liberty interest—is invaded also. Thus, Appellant claims the construction and meaning of the Due Process Clause makes it applicable also to situations where the lienee's liberty interest is invaded (whether he be the property owner at that moment of lien or not) by a false, libelous lien which names him improperly as lienee.

e. Virginia case law requires that for a lien to be valid, the lien must name the property owner of record.[25] The May 19, 1993, POA lien did not name the property owner of record (the property having been sold and the deed transferring title having been recorded over a month prior to the Defendants recording the POA lien). The *ex relatu* plaintiff Tysons Manor Homeowners Association did not file a new lien against the new property owner of record.

f. Thus, a three-fold effect is produced by such POA lien: (1) the lienee is libeled by a false, unlawful lien, invading his liberty interest, (2) the actual property owner is deprived of a significant property interest as his property is subjected to lien

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[25] In Virginia, a lien must be filed against the property owner of record, according to the holding of the Virginia Supreme Court in *Wallace v. Brumback*, 177 Va. 36, 12 S.E.2d 801 (1941).

improperly, and (3) each is deprived of his Federal civil rights, protected under 42 USC §1983. The *ex relatu* plaintiff Tysons Manor HOA employed the May 19, 1993 POA lien as ancillary process, for prejudgment attachment.

As to the two June 28, 1994, POA liens—

7. a. Two constitutionally-protected private interests of persons affected by the June 28, 1994, POA liens are involved: a property interest and a liberty interest. The *ex relatu* plaintiff Sky Bryce Association, Inc., (hereinafter Sky Bryce POA) filed the two June 28, 1994 POA liens without predeprivation hearing, thus without Due Process to the Appellant, as the property owner, and to the Appellant, as lienee, and deprived the Appellant, as the property owner, and deprived the Appellant, as lienee, of two significant constitutionally-protected interests: (1) as a lien, by invading the property owner's (the Appellant's) property interest, and (2) as a libelous lien, employed as ancillary process, by invading the lienee's (the Appellant's) liberty interest.

b. *Ex relatu* plaintiff Sky Bryce POA filed the two false June 28, 1994, POA liens against Appellant as named lienee, and as the property owner of record, and deprived the Appellant, as *property owner*, of a significant, constitutionally-protected interest: his property interest; and as *lienee*, of another significant, constitutionally-protected interest: by a false, unlawful (therefore libelous) POA lien invading Appellant's liberty interest

8. Thus, the first factor of *the Mathews v. Eldridge, supra*, test—significant private interests are affected—is satisfied.

As to the Doehr-version of the second Mathews factor—

> **"...second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards..."** [*Connecticut v. Doehr, id.*, at 13.]

9. The Appellant was not accorded due process by the Virginia property owners association lien law in the underlying

ex relatu actions because "[D]ue Process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use." [*Sniadach v. Family Finance Corp., supra*, cited with approval in *Fuentes v. Shevin, id.*, at 579.]

a. In the Tysons Manor HOA *ex relatu* action underlying this *appeal*, the underlying claim—that the Appellant, as lienee of the May 19, 1993, POA lien, was indebted for the amount claimed, to the claimant lienor—Tysons Manor Homeowners Association—was *untrue*.

b. In the Sky Bryce POA *ex relatu* action underlying this appeal, the underlying claim—that the Appellant, as lienee of the June 28, 1994, POA liens, was indebted for the amount claimed, to the claimant lienor—Sky Bryce Association, Inc.—was *untrue*.

10. The U. S. Supreme Court has stated:

> "The right to prior notice and a hearing is central to the Constitution's command of due process. 'The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property...' *Fuentes v. Shevin*, 407 U.S. at 80-81, 92 S.Ct., at 1994-1995." [*U.S. v. James Daniel Good Real Property*, 114 S.Ct. 492, at 500-501 (1993).]

11. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, denies the Appellant, as property owner and as lienee, the minimum Due Process—notice and an opportunity to be heard, as set forth in *Mullane, supra*, and its progeny—and made applicable by *Connecticut v. Doehr, supra*, to "even the

temporary or partial impairments to property rights that attachments, *liens*, and other encumbrances entail."[26]

12. The *risk of erroneous (or malicious) deprivation* of constitutionally-protected private interests through the procedures provided in the Virginia POA lien statutes is substantial, as demonstrated herein, and the probable value of additional or substitute procedural safeguards included in the Virginia POA lien statutes, as demonstrated herein, was and is insufficient to mitigate that risk.

13. The *postdeprivation* safeguards which the Virginia POA lien statutes afford are insufficient and do not adequately reduce the risk of erroneous deprivation. In fact, in the instant May 19, 1993 POA lien, the burden of the erroneous, false, malicious deprivation fell upon an unsuspecting, subsequent owner of the property liened. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide adequate provisions for safeguarding Due Process. Particularly lacking in the Virginia POA lien law are the following safeguards (flowing from *Connecticut v. Doehr, supra*):

a. Although the Virginia POA lien law, *on its face*, provides for prior notice of intent to lien (which is not the same as Due Process notice), there is no requirement for a showing that such notice was given to the lienee;

b. Notice of intent to lien is not synonomous with Due Process notice—that is, notice of the date and time where the lienee may appear to contect the POA lien;

c. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide for a *predeprivation* hearing;

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26 "To the contrary, our cases show that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection. Without doubt, state procedures for creating and enforcing attachments, as with liens, 'are subject to the strictures of due process.'" [*Connecticut v. Doehr, id.*, at 14.]

d. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide for notice of a lien's filing to be served upon the property owner concurrently with the lien's filing;

e. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, deprives an owner of the unrestricted use and full enjoyment of his property for an unreasonably long time. From the date the POA lien is filed, the lienor has two years in which to bring suit to enforce the lien; to that two years, add the time to adjudicate the suit to enforce the lien—during all of which time period the lienee/owner cannot free his property from the effects of that POA lien.

f. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide for an early *postdeprivation* hearing. By comparison, the Virginia mechanics' lien law provides for a validity hearing, in accordance with *Virginia Code §43-17.1*, although not an *early* hearing, as set forth in *Connecticut v. Doehr, supra*, and even though the hearing is actually on the invalidity of the mechanics' lien, with the burden of proof actually falling upon the lienee/owner, there is no similar provision for challenging the POA lien in the Virginia POA lien law.

g. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide that the lienee/property owner may free his property from the lien by posting a bond.

h. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide a requirement that the *lienor* post a bond to protect the lienee against damages resulting from erroneous deprivation by erroneous, false, or fraudulent lien. There is no adequate method for redress for damages suffered by lienee as a result of erroneous, or fraudulent, or libelous liens.

i. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide that the lien be issued under the supervision of a judge but, rather, provides that the recording of the lien is a ministerial function of a clerical employee in the Office of the Clerk of the Circuit Court, who admits the lien to record by endorsing the lien memorandum with the official *indicia* and attestation of the Clerk of the Circuit Court, as Recorder of Deeds, and the date of filing.

j. The Virginia POA lien law, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, does not provide that the lien *affidavit* contain sufficient substantive facts underlying conclusory allegations of the debt alleged, on which a judge could make a meaningful determination, even if such judge were to see the *memorandum of lien* prior to the lien attaching.

14. The *postdeprivation remedies for redress* of the damages attributable to false, or erroneous, or malicious POA liens complained of in the instant action, are inadequate, *on their face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, in that:

a. The unconstitutional Virginia property owners association lien law, particularly *Virginia Code §55-514* through *§55-516*, prescribes no requirement for a POA lienor to post a bond, prior to liening property, to compensate a lienee harmed improperly for damage as a consequence of the lien.

b. There are no *entitlements* or effective avenues within the Commonwealth of Virginia for redress for one deprived of constitutionally-protected rights and interests, or for one libeled or defamed or whose title is slandered by a false, erroneous, or malicious POA lien.

(1) Any action for libel or defamation of title would meet with a demurrer filed by the lienor, based upon *Donohoe Constr. Corp. v. Mount Vernon Assoc.*, 235 Va. 531, 369 S.E.2d 857 (1988), claiming absolute privilege for a POA lien as a judicial action equivalent to a mechanics' lien.

(2) *Donohoe, supra*, does not create an entitlement to a route of redress of damages through cause of action either for malicious prosecution or for abuse of process. Any avenues of redress for malicious prosecution or abuse of process would be blocked by the English rule, with the lienor claiming that the filing of a POA lien does not satisfy the English rule. Further, such avenues are impracticable for being far more costly to pursue than a plaintiff could hope to recover.

c. The unconstitutional Virginia property owners association lien law, particularly Virginia Code §55-514 through §55-516, *on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, prescribes no procedure by which the lienee can controvert the validity of the lien and no procedure by which the lienee may have false liens removed from record (not merely released of record).

15. Thus, the Virginia POA lien statutes, *on their face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, fail the second factor of the *Mathews v. Eldridge, supra*, test—the risk of erroneous deprivation through the procedures under attack is significant and the probable value of additional or alternative safeguards is inadequate.

As to the Doehr-version of the third Mathews factor—

> **"...and third, in contrast to Mathews, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or foregoing the added burden of providing greater protections."** [*Connecticut v. Doehr, id.*, at 13.]

16. a. The interest of the private party seeking the prejudgment remedy is not greater than the interests of the affected lienee/property owner, so as to outweigh the constitutionally-protected interests of the lienee/property owner being deprived of those interests:

(1) The interest of the POA lienor cannot be greater than the interest of the owner of the property and, until the lien attaches, the POA lienor has *no* interest in the prospective lienee/property owner's property. The lienor may be interested to collect the alleged debt, but the lienor has no interest in the lienee's property. The Virginia POA lien law does not invest the prospective POA-lienor property owners association with any form of ownership interest or inchoate interest in the properties of its property owner members, until the lien attaches.

(2) The interests of the lienor (May 19, 1993 lien: Tysons Manor HOA, et al.; June 28, 1994 liens: Sky Bryce POA) in favor of an *ex parte* attachment of the POA lien are too minimal to diminish the need for a *predeprivation* hearing, especially as the Appellant (a) was, and is, an in-state Virginia resident, (b) was an owner of other Virginia property at the time, and therefore, (c) was servable with notice by sheriff, so that there was no need to attach the *res*—the real properties—to obtain jurisdiction over Appellant Breedlove.

(3) *Ex relatu* plaintiff Tysons Manor HOA never did bring any action against the new owner to enforce the May 19, 1993 POA lien they placed on the Fairfax County property, demonstrating that the *ex relatu* plaintiff's purpose for filing the May 19, 1993, POA lien was prejudgment attachment and collection by coercion.

(4) To date, *ex relatu* plaintiff Sky Bryce POA has not brought any action against Appellant to enforce the June 28, 1994, POA liens they placed on the Appellant's Shenandoah County properties, (in which enforcement suit the Appellant, as lienee property owner, would be permitted to contest the unlawful, unconstitutional June 28, 1994, POA liens), demonstrating that the *ex relatu* plaintiff's purpose for filing the June 28, 1994, POA liens was prejudgment attachment and collection by coercion.

(5) Virginia case law requires that for a lien to be valid, the lien must name the property owner of record.[27] The May

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[27] In Virginia, a lien must be filed against the property owner of record, according to the holding of the Virginia Supreme Court in *Wallace v. Brumback*, 177 Va. 36, 12 S.E.2d 801 (1941).

19, 1993, POA lien did not name the property owner of record (the property having been sold and the deed transferring title having been recorded over a month prior to *ex relatu* plaintiff Tysons Manor HOA recording the May 19, 1993, POA lien). The *ex relatu* plaintiff Tysons Manor HOA did not file a new lien against the new property owner of record.

b. The state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural Due Process requirement would entail, does not outweigh the constitutionally-protected interests of the lienee/property owner being deprived of those interests.

(1) The interest of the State cannot be greater than the interest of the POA lienor of the property and, until the lien attaches, the POA lienor has no interest in the prospective lienee's property.

(2) Were the Commonwealth of Virginia to intervene, the Commonwealth may well argue that the interests of the state are substantial in furthering the ability of property owners associations to collect amounts due to them, and that the Due-Process procedure of a predeprivation hearing would interfere with the efficient operation of these statutory POA lien procedures. But such argument is not well founded, as predeprivation hearings currently work well under the state mechanics' lien laws of Hawaii and Maryland.

(3) Furthermore, the United States Supreme Court has stated in *Fuentes v. Shevin:*

> "Procedural due process is not intended to promote efficiency or accomodate all possible interests; it is intended to protect the particular interests of the person whose possessions are about to be taken." [*Fuentes v. Shevin*, 407 U.S., at 90, 32 L.Ed.2d, at 576, note 22, 92 S.Ct. 1983 (1972)]

(4) If there is to be a judicial hearing on POA liens, either in Virginia's general district or circuit courts, the cost burden can be shouldered by court fees and costs, taxed as appropriate.

c. There were no exigent circumstances shown or present on the date the May 19, 1993 POA lien was filed by *ex relatu* plaintiff Tysons Manor HOA or on the date the two June 28, 1994, POA liens were filed by *ex relatu* plaintiff Sky Bryce POA, which would have mandated the need to by-pass a *predeprivation* hearing.

As to the May 19, 1993, lien—

(1) The prejudgment attachment of the May 19, 1993, POA lien occurred without a prior hearing, despite the following facts:

(a) The prejudgment attachment of the May 19, 1993, POA lien seized and held the *res*—the liened real property—in *custodia legis*, although such seizure was not directly necessary to secure an important governmental or general public interest.

(b) There was no special need for very prompt action, which would dictate the by-passing of a predeprivational hearing. Argument cannot be heard that a predeprivational hearing must be by-passed to prevent the prospective lienee from transferring the property, given advance warning (i.e., notice). A valid POA lien may be filed either before or after a property transfer and real estate is not subject to removal from the State court's jurisdiction (as a ship would be, in a matter of an attachment).

(c) The State—the Commonwealth of Virginia—did not keep strict control over its monopoly of legitimate force. The private parties (the *ex relatu* plaintiff Tysons Manor HOA) who initiated the prejudgment attachment of the May 19, 1993, POA lien, seizing and holding the property in non-possessory seizure, were not governmental officials responsible for determining, under the standards of a narrowly-drawn statute, that it was necessary and justified. In particular, the *ex relatu* plaintiff Tysons Manor HOA filed lien against the property of a third person, for a debt alleged against the Appellant.

As to the two June 28, 1994, liens—

(2) The prejudgment attachment of the June 28, 1994, POA lien occurred without a prior hearing, despite the following facts:

(a) The prejudgment attachment of the two June 28, 1994, POA liens seized and held the *res*—the liened real properties—in *custodia legis*, although such seizure was not directly necessary to secure an important governmental or general public interest.

(b) There was no special need for very prompt action, which would dictate the by-passing of a predeprivational hearing. A valid lien may be filed either before or after a property transfer and real estate is not subject to removal from the State court's jurisdiction.

(c) The State—the Commonwealth of Virginia—did not keep strict control over its monopoly of legitimate force. The private parties (the *ex relatu* plaintiff Sky Bryce POA) who initiated the prejudgment attachment of the two June 28, 1994, POA liens, seizing and holding the properties in non-possessory seizure, were not governmental officials responsible for determining, under the standards of a narrowly-drawn statute, that it was necessary and justified.

17. The U.S. Supreme Court also stated in *Fuentes v. Shevin, supra*, its criteria for truly unusual situations in which a predeprivational hearing may be by-passed.[28] The circumstances of the instant underlying *ex relatu* actions do not satisfy the conditions for summary seizure of property.

18. The U.S. Supreme Court reaffirmed and strengthened its rationale in favor of predeprivation hearings, set forth in

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28 "First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded food." [*Fuentes v. Shevin*, 407 U.S., at 91-92, 32 L.Ed.2d, at 576-577.]

Fuentes, supra, in 1993 in *U.S. v. James Daniel Good Real Property.*[29]

a. In the instant action, too, the prejudgment attachment of real estate by property owners association lien without prior notice or hearing is unconstitutional in the absence of extraordinary circumstances, even though the attachment of the property owners association lien *might* not interfere with the owner's use or possession and does not affect, as a general matter, rentals from existing leaseholds.

b. In the circumstances of the instant property owners association liens, the liens *did* and *do* interfere with the owner's use of the properties: (1) denying to the liened third-party property owner unencumbered transferability and unencumbered mortgageability, due to the May 19, 1993, POA lien; and (2) denying to the Appellant, as liened property owner, unencumbered transferability and unencumbered mortgageability, due to the June 28, 1994, POA liens.

19. Thus, the Virginia POA lien statutes, *on their face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, fail the third factor of the *Mathews v. Eldridge, supra*, test—principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or foregoing the added burden of providing greater protection do not outweigh the need to safeguard the constitutionally-protected interests of the lienee/property owner by due process.

20. By the three-part judicial test of *Mathews v. Eldridge, supra*, as modified for private-party-initiated deprivations in *Connecticut v. Doehr, supra*, the Virginia property owners

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29 "In *Fuentes*, we held that the loss of kitchen appliances and household furniture was significant enough to warrant a predeprivation hearing. 497 U.S., at 70-71, 92 S.Ct., at 1989. And in *Connecticut v. Doehr*, — U.S. —, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), we held that a state statute authorizing prejudgment attachment of real estate without prior notice or hearing was unconstitutional, in the absence of extraordinary circumstances, even though the attachment did not interfere with the owner's use or possession and did not affect, as a general matter, rentals from existing leaseholds." [*U.S. v. James Daniel Good Real Property*, — U.S., at —, — L.Ed.2d, at —, 114 S.Ct. 492, at 501 (1993).]

association lien law, particularly *Virginia Code §55-514* through *§55-516, on its face*, and *as applied* in the instant POA liens complained of in the instant May 17, 1994, *Complaint*, **is and was unconstitutional**.

***Exhibit 12 Virginia Property Owner Association lien law,* Virginia Code (1950), as amended, §55-514 *through* §55-516**

Copy of *Virginia Code §55-514* through *§55-516* follows this page.

of votes cast, in person or by proxy, at a meeting convened in accordance with the provisions of the association's bylaws and called for that purpose, shall repeal or amend any rule or regulation adopted by the board of directors. Rules and regulations may be enforced by any method normally available to the owner of private property in Virginia, including, but not limited to, application for injunctive relief or damages, during which the court may award to the association court costs and reasonable attorneys' fees.

B. The board of directors of the association shall also have the power, to the extent the declaration or rules and regulations duly adopted pursuant thereto expressly so provide, to (i) suspend a member's right to use facilities or nonessential services offered by the association for nonpayment of assessments to the extent that access to the lot through the common areas is not precluded and (ii) assess charges against any member for any violation of the declaration or rules and regulations for which the member or his family members, tenants, guests, or other invitees are responsible. Before any such charges may be assessed, the member shall be given an opportunity to be heard and to be represented by counsel before the board of directors or other tribunal specified in the documents. Notice of a hearing shall be hand delivered or mailed by registered or certified mail, return receipt requested, to the member at the address of record with the association at least fourteen days prior to the hearing. The amount of any charges so assessed shall not exceed fifty dollars for a single offense or ten dollars per day for any offense of a continuing nature and shall be treated as an assessment against the member's lot for the purposes of § 55-516. (1989, c. 679; 1991, c. 667; 1993, c. 956.)

The 1991 amendment, in the third sentence of subsection A, substituted "A majority of votes cast, in person or by proxy" for "The members of the association may, by a majority of the members present in person or by proxy," substituted "association's bylaws" for "association's declaration" and inserted "shall"; and rewrote subsection B.

The 1993 amendment inserted clause (i), and added the clause (ii) designation in subsection B.

§ 55-514. Authority to levy special assessments. — A. In addition to all other assessments which are authorized in the declaration, the board of directors of an association shall have the power to levy a special assessment against its members if the purpose in so doing is found by the board to be in the best interests of the association and the proceeds of the assessment are used primarily for the maintenance and upkeep, including capital expenditures, of the common area. A majority of votes cast, in person or by proxy, at a meeting of the membership convened in accordance with the provisions of the association's bylaws within sixty days of promulgation of the notice of the assessment shall rescind or reduce the special assessment. No director or officer of the association shall be liable for failure to perform his fiduciary duty if a special assessment for the funds necessary for the director or officer to perform his fiduciary duty is rescinded by the owners pursuant to this section, and the association shall indemnify such director or officer against any damage resulting from any claimed breach of fiduciary duty arising therefrom.

B. The failure of a member to pay the special assessment allowed by subsection A shall entitle the association to the lien provided by § 55-516 as well as any other rights afforded a creditor under law.

C. The failure of a member to pay the special assessment allowed by subsection A will provide the association with the right to deny the member access to any or all of the common areas. Notwithstanding the immediately preceding sentence, direct access to the member's lot over any road within the

development which is a common area shall not be denied the member. (1989, c. 679; 1991, c. 667; 1992, c. 450.)

The 1991 amendment substituted "the" for "such" throughout the section; in subsection A, deleted "periodic" preceding "special assessment" in the first sentence, substituted "A majority of votes cast, in person or by proxy, at a meeting of the membership convened in accordance with the provisions of the association's bylaws within sixty days of promulgation of the notice of the assessment shall rescind the special assessment" for "Any such special assessment may be rescinded by majority vote of the members attending a meeting of the membership convened in accordance with the provisions of the association's declaration within sixty days of receipt of the notice of such assessment" in the second sentence and added the third sentence; and substituted "the member" for "said member" in the second sentence of subsection C.

The 1992 amendment inserted "or reduce" near the end of the second sentence of subsection A.

§ 55-515. Compliance with declaration. — A. Every lot owner, and all those entitled to occupy a lot shall comply with all lawful provisions of this chapter and all provisions of the declaration. Any lack of such compliance shall be grounds for an action or suit to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the association, or by its executive organ or any managing agent on behalf of such association, or in any proper case, by one or more aggrieved lot owners on their own behalf or as a class action. The prevailing party shall be entitled to recover reasonable attorneys' fees and costs expended in the matter.

B. A declaration may provide for arbitration of disputes or other means of alternative dispute resolution. Any such arbitration held in accordance with this subsection shall be consistent with the provisions of this chapter and Chapter 21 (§ 8.01-577 et seq.) of Title 8.01. The place of any such arbitration or alternative dispute resolution shall be in the county or city in which the development is located, or as mutually agreed to by the parties. (1989, c. 679; 1993, c. 956.)

The 1993 amendment added the subsection A designation and added subsection B.

§ 55-516. Lien for assessments. — A. Once perfected, the association shall have a lien on every lot for unpaid assessments levied against that lot in accordance with the provisions of this chapter and all lawful provisions of the declaration. The lien, once perfected, shall be prior to all other subsequent liens and encumbrances except (i) real estate tax liens on that lot, (ii) liens and encumbrances recorded prior to the recordation of the declaration, and (iii) sums unpaid on and owing under any mortgage or deed of trust recorded prior to the perfection of said lien. The provisions of this subsection shall not affect the priority of mechanics' and materialmen's liens. Notice of a memorandum of lien to a holder of a credit line deed of trust under § 55-58.2 shall be given in the same fashion as if the association's lien were a judgment.

B. The association, in order to perfect the lien given by this section, shall file before the expiration of twelve months from the time such assessment became due and payable in the clerk's office in the county or city in which such development is situated, a memorandum, verified by the oath of the principal officer of the association, or such other officer or officers as the declaration may specify, which contains the following:

1. The name of the development;
2. A description of the lot;
3. The name or names of the persons constituting the owners of that lot;

4. The amount of unpaid assessments currently due or past due relative to such lot together with the date when each fell due;

5. The date of issuance of the memorandum;

6. The name of the association and the name and current address of the person to contact to arrange for payment or release of the lien; and

7. A statement that the association is obtaining a lien in accordance with the provisions of the Virginia Property Owners' Association Act as set forth in Chapter 26 (§ 55-508 et seq.) of Title 55.

It shall be the duty of the clerk in whose office such memorandum shall be filed as hereinafter provided to record and index the same as provided in subsection D, in the names of the persons identified therein as well as in the name of the association. The cost of recording and releasing the memorandum shall be taxed against the person found liable in any judgment or decree enforcing such lien.

C. Prior to filing a memorandum of lien, a written notice shall be sent to the property owner by certified mail, at the property owner's last known address, informing the property owner that a memorandum of lien will be filed in the circuit court clerk's office of the applicable city or county. The notice shall be sent at least ten days before the actual filing date of the memorandum of lien.

D. Notwithstanding any other provision of this section, or any other provision of law requiring documents to be recorded in the miscellaneous lien books or the deed books in the clerk's office of any court, on or after July 1, 1989, all memoranda of liens arising under this section shall be recorded in the deed books in the clerk's office. Any memorandum shall be indexed in the general index to deeds, and the general index shall identify the lien as a lien for lot assessments.

E. No suit to enforce any lien perfected under subsection B shall be brought after twenty-four months from the time when the memorandum of lien was recorded; however, the filing of a petition to enforce any such lien in any suit wherein the petition may be properly filed shall be regarded as the institution of a suit under this section. Nothing herein shall extend the time within which any such lien may be perfected.

F. The judgment or decree in an action brought pursuant to this section shall include, without limitation, reimbursement for costs and reasonable attorney's fees, together with interest at the maximum lawful rate for the sums secured by the lien from the time each such sum became due and payable.

G. When payment or satisfaction is made of a debt secured by the lien perfected by subsection B hereof, the lien shall be released in accordance with the provisions of § 55-66.3. For the purposes of § 55-66.3 the principal officer of the association, or any other officer or officers as the declaration may specify, shall be deemed the duly authorized agent of the lien creditor.

H. Nothing in this section shall be construed to prohibit actions at law to recover sums for which subsection A hereof creates a lien, maintainable pursuant to § 55-515. (1989, c. 679; 1991, c. 667.)

The 1991 amendment, in subsection B, substituted "twelve months" for "six months" in the first paragraph and inserted "Virginia" in subdivision 7; substituted "the general index" for "such general index" in subsection D; added present subsection F; redesignated former subsections F and G as present subsections G and H; and in present subsection G, substituted "the lien shall be released" for "said lien shall be released" in the first sentence and substituted "any other officer or officers" for "such other officer or officers" in the second sentence.

(2)

95-474

No. 94-2106

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1995

KENDALL H. BREEDLOVE,

Petitioner,

v.

TYSONS MANOR HOMEOWNERS ASSOCIATION AND CHARLOTTE M. SCHOW,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

STEPHEN A. HORVATH
(Counsel of Record)
JOHN D. MCGAVIN
MELISSA S. HOGUE
TRICHILO, BANCROFT, MCGAVIN, HORVATH & JUDKINS, P.C.
4117 Chain Bridge Road, Suite 400
P.O. Box 22
Fairfax, Virginia 22030
(703) 385-1000

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether Petitioner, Kendall H. Breedlove, has standing to assert a cause of action under 42 U.S.C. Section 1983?

2. Whether the Fourth Circuit Court of Appeals properly affirmed the district court's ruling dismissing petitioner's Amended Complaint for failing to state a cause of action under 42 U.S.C. Section 1983?

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Pursuant to Rule 29.1, Respondents, Tysons Manor Homeowners Association and Charlotte M. Schow state that it does not have any parent companies or non-wholly owned subsidiaries. Charlotte M. Schow is an individual and Tysons Manor Homeowners Association is a home-owners association.

SUBJECT INDEX

	Page
QUESTIONS PRESENTED	i
LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES	ii
SUBJECT INDEX	iii
TABLE OF CITATIONS	iv
CITATIONS OF THE OPINIONS AND JUDGMENT DELIVERED IN THE COURTS BELOW	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. BREEDLOVE HAS NO STANDING TO ASSERT A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 OR ANY VIOLATION OF HIS CONSTITUTIONAL RIGHTS	6
II. EVEN ASSUMING THAT BREEDLOVE HAD STANDING TO BRING AN ACTION, THE FOURTH CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S RULING GRANTING TYSONS MANOR HOA'S 12(b)(6) MOTION TO DISMISS BECAUSE BREEDLOVE FAILED TO STATE A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 IN HIS AMENDED COMPLAINT	7
III. BREEDLOVE ERRONEOUSLY RELIES ON *COLEMAN v. THOMPSON*, 501 U.S. 722 (1991), FOR THE PROPOSITION THAT THE FOURTH CIRCUIT COURT OF APPEALS HAD TO SET FORTH WRITTEN DETERMINATIONS IN ITS ORDER AFFIRMING THE DISTRICT COURT'S RULING	11
CONCLUSION	12

TABLE OF CITATIONS

Page

CASES

B.M.H. By C.D. v. Schoolboard of City of Chesapeake, Virginia, 833 F.Supp. 560 (E.D. Va. 1993) 8, 9

Baker v. Carr, 369 U.S. 186 (1962)..... 6

Brown v. Lutz, 316 F.Supp. 1096 (E.D. La. 1970)..... 6

Coleman v. Thompson, 501 U.S. 722 (1991).....11, 12

County Court of Ulster County v. Allen, 414 U.S. 140, 154-63 (1979) 6

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 6

Hinman v. Lincoln Towing Service, Inc., 771 F.2d 189 (7th Cir. 1985)..... 10

Lugar v. Edmondson Oil Co., 457 U.S. 922, 925 (1982).....7, 9, 10, 11

Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976) 10

Warth v. Seldin, 422 U.S. 490, 500 (1978)..... 6

West v. Atkins, 487 U.S. 42 (1988) 8

STATUTES

42 U.S.C. Section 1983 ..... *passim*

CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Petitioner, Kendall H. Breedlove ("Breedlove") seeks to recover compensatory, general and punitive damages against respondents, Tysons Manor Homeowners Association and Charlotte M. Schow (hereinafter jointly "Tysons Manor HOA") under 42 U.S.C. Section 1983 alleging that Tysons Manor HOA acted under color of state law by filing a Memorandum of Lien against property he had once owned. The district court, by Order dated September 9, 1994, granted Tysons Manor HOA's Rule 12(b)(6) Motion to Dismiss finding that Breedlove failed to state a cause of action under 42 U.S.C. Section 1983. (Appendix to Petition for Writ of Certiorari ("Pet. App.") at A12). At the hearing on the Motion to Dismiss, the district court also questioned whether Breedlove had standing to bring this action since Breedlove admitted he no longer owned the property upon which the lien was filed, and therefore, agreed that "somebody else's title was clouded". (Appendix to Brief in Opposition ("Br. Opp. App.") at A10).

Breedlove appealed the district court's ruling to the Fourth Circuit Court of Appeals. The Fourth Circuit Court of Appeals affirmed the district court's ruling by Order dated April 4, 1995. (Pet. App. at A1-A2). The Fourth Circuit stated that

> [o]ur view of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. *Breedlove v. Tysons Manor Homeowners Ass'n*, No. CA-94-647-A (E.D. Va.

September 9, 1994). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

Breedlove filed a Petition for Rehearing with the Fourth Circuit. By Order dated May 19, 1995, the Fourth Circuit denied the Petition for Rehearing. (Pet. App. at A3). Breedlove now appeals to this Honorable Court.

Respondents respectfully assert that the Fourth Circuit Court of Appeals properly affirmed the district court's ruling and contend that this Court should deny Breedlove's Petition for Writ of Certiorari. Breedlove not only failed to state a cause of action under 42 U.S.C. Section 1983 against respondents but he has absolutely no standing to pursue this matter. Moreover, there are no special and important reasons nor any of the grounds provided in Rule 10 of the Rules of the United States Supreme Court which warrant any review by this Honorable Court.

STATEMENT OF THE CASE

Breedlove filed an Original Complaint to the United States District Court for the Eastern District of Virginia (Alexandria Division) against respondents Tysons Manor Homeowners Association and Charlotte M. Schow alleging a cause of action under 42 U.S.C. Section 1983 and the Fourteenth Amendment of the United States Constitution.

Breedlove was a former owner of real property governed by the Tysons Manor Homeowners Association in Fairfax County, Virginia. (*See* Amended Complaint, paragraph 7). After he transferred title to this property to another individual, Tysons Manor HOA filed a Memorandum of Lien in the Circuit Court of Fairfax County allegedly due to Breedlove's failure to pay his homeowner's association dues. This Memorandum of Lien was recorded in the land records section of the Circuit Court of Fairfax County against the real property Breedlove had *formerly* owned. (*See* Amended Complaint, paragraph 10). Breedlove was unaware of this Memorandum of Lien until approximately six months after it had been filed when the new owner of the property brought it to his attention. (*See* Amended Complaint, paragraph 13).

A Certificate of Release of Memorandum of Lien was filed by Tysons Manor Homeowners Association and recorded in the land records of Fairfax County on December 12, 1993. (*See* Amended Complaint, paragraph 14). The owner of the property, who had purchased the land from Breedlove prior to the filing of the lien, paid the lien. *Id.*

Even though Breedlove had no ownership interest in the real property against which the Memorandum of Lien was filed, he alleges that he was deprived of "federally" protected civil rights and that the respondents, Tysons Manor Homeowners Association and its treasurer, Charlotte M. Schow, acted under "color of unconstitutional state law," specifically Virginia Code §§ 55-514-516, by obtaining "significant aid from state officials as the lien was recorded in land records."

Tysons Manor HOA filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure in response to Breedlove's Original Complaint alleging that Breedlove failed to state a cause of action upon which relief can be granted. Tysons Manor HOA asserted that it did not act under color of state law simply because a court clerk recorded the Memorandum of Lien that it had filed. The district court, after hearing argument from both parties, granted Tysons Manor HOA's Motion to Dismiss and allowed Breedlove fifteen days within which to file an Amended Complaint.

Breedlove filed an Amended Complaint essentially pleading the same facts and causes of action against Tysons Manor HOA as in his Original Complaint. Tysons Manor HOA filed another Rule 12(b)(6) Motion to Dismiss asserting that the Amended Complaint still failed to state a cause of action upon which relief can be granted and that there was no cure for this deficiency.

After hearing oral argument on Tysons Manor HOA's Rule 12(b)(6) Motion to Dismiss the Amended Complaint, the district court granted the Motion to Dismiss with prejudice. The court held that Breedlove failed to state a cause of action under 42 U.S.C. Section 1983 because there was "no state action," and further stated that

> "[t]his simple recording of a lien, which is a ministerial act required by law for the clerk to do, just simply is not the state action that *Lugar* is talking about." (Br. Opp. App. at A15).

Furthermore, the court questioned Breedlove's standing to bring this action based on the fact that Breedlove

did not even own the property upon which the lien was placed and queried as follows:

> Court: So you really didn't have a lien? Somebody else had the lien?
>
> Breedlove: Somebody else's title was clouded. And point of fact part of my allegations are that this infringed and invaded my liberty interest.
>
> Court: How would that be? If they didn't put a lien on you, they liened somebody else, he is the one that had the problem with the lien and not you.
>
> * * *
>
> Court: But they didn't attach anything. In fact, they didn't even get it on your property from what you tell me. (Br. Opp. at A10, A14).

The Fourth Circuit Court of Appeals affirmed the district court's ruling dismissing Breedlove's Amended Complaint and denied Breedlove's Petition for Rehearing.

SUMMARY OF ARGUMENT

Breedlove has no standing to assert a cause of action, and therefore, this eliminates any need to consider this matter on its merits. Moreover, even assuming Breedlove has standing, he has failed to state a cause of action under 42 U.S.C. Section 1983 upon which relief can be granted because he was not deprived of any federally

protected rights and the respondents did not act under "color of state law."

ARGUMENT

I. BREEDLOVE HAS NO STANDING TO ASSERT A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 OR ANY VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy" as to show that he has sustained or is immediately in danger of sustaining some direct injury and not merely that the party suffers in some indefinite way in common with people generally. *Baker v. Carr*, 369 U.S. 186 (1962). In order to be entitled to any judicial relief, the requisites of standing must be alleged and shown. *Brown v. Lutz*, 316 F.Supp. 1096 (E.D. La. 1970). To have standing, Breedlove must allege that "the challenged action has caused him 'injury in fact' and demonstrate a 'fairly traceable' causal connection between the claimed injury and the challenged conduct." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). The standing in question is essentially "whether the constitution or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Generally, a party cannot advance the rights of others. *County Court of Ulster County v. Allen*, 414 U.S. 140, 154-63 (1979).

Here, Breedlove is not entitled to any judicial relief for any alleged deprivation of due process. He had absolutely no ownership interest in the property upon which the lien was filed; "somebody else's title was clouded." The owner of the property paid the lien; Breedlove did not pay to have the lien removed. Breedlove suffered "no injury in fact"; Breedlove has no "personal stake in the outcome of the controversy" as to give him standing to bring this suit. Thus, since Breedlove cannot establish the requisite standing which must be alleged and shown, this eliminates any need to consider the matter on its merits.

II. EVEN ASSUMING THAT BREEDLOVE HAD STANDING TO BRING AN ACTION, THE FOURTH CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S RULING GRANTING TYSONS MANOR HOA'S 12(b)(6) MOTION TO DISMISS BECAUSE BREEDLOVE FAILED TO STATE A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 IN HIS AMENDED COMPLAINT.

Title 42 U.S.C. Section 1983 provides a remedy for deprivation of rights secured by the Constitution and laws of the United States when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage, of any state or territory . . . "[1] *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 925 (1982).

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[1] 42 U.S.C. Section 1983 states that

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the

The following elements are necessary to support a proper cause of action under 42 U.S.C. Section 1983:

(1) plaintiff must allege violation of rights secured by the Constitution and laws of the United States; and

(2) plaintiff must show that the alleged deprivation was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42 (1988); *B.M.H. by C.D. v. Schoolboard of City of Chesapeake, Virginia*, 833 F.Supp. 560 (E.D. Va. 1993).

In the present case, Breedlove has failed to state a cause of action under 42 U.S.C. Section 1983 upon which relief can be granted. First, Breedlove was not deprived of any federally protected rights. Second, Tysons Manor HOA did not act under "color of state law."

A. Breedlove was not deprived of any federally protected rights.

Breedlove alleges that his constitutional rights had been violated because Tysons Manor HOA filed a Memorandum of Lien which was recorded in the land records of the Circuit Court of Fairax County against real property that he had once owned. At the time the lien was filed and recorded, Breedlove had already transferred the title of the property to another individual. Breedlove claims that Tysons Manor HOA acted under color of state

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deprivation of any rights, privileges, immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for redress. . . .

law because a clerk of Fairfax County Circuit Court performed the ministerial act of recording the lien. Therefore, he asserts that he has a cause of action under 42 U.S.C. Section 1983.

The recording of the lien did not deprive Breedlove of any of his federally protected rights. Breedlove did not own the property; therefore, none of his property rights were violated. Furthermore, none of Breedlove's property was either garnished, seized, attached or sequestered. *Cf. Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). None of his due process rights were violated because nothing was taken from him. Therefore, Breedlove cannot establish the necessary element of being deprived of a federally protected right to support a cause of action under 42 U.S.C. Section 1983. *See B.M.H. by C.B. v. Schoolboard of City of Chesapeake, Virginia*, 833 F.Supp. 560 (E.D. Va. 1993).

B. Tysons Manor HOA did not act under color of state law.

In order to maintain a cause of action under 42 U.S.C. Section 1983 against a private individual, it must also be shown that the conduct allegedly causing the deprivation of a federal right is fairly attributable to the state. *Lugar*, 457 U.S. at 937. This question of "fair attribution" requires a two-part approach. First, the deprivation must be caused by the exercise of some right or privilege created by the state. *Id.* Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. *Id.* This may be because he is a state official, obtained significant aid from state officials, or

because his conduct is otherwise chargeable to the state. *Id.*

Even *assuming arguendo* that some type of deprivation occurred, Breedlove has failed to state facts upon which Tyson Manor HOA may fairly be said to be a "state actor." In this case, the court clerk's simple act of recording a Memorandum of Lien against property once owned by Breedlove is a ministerial function which does not satisfy the Section 1983 requirement of Tysons Manor HOA acting under color of state law. *See generally Hinman v. Lincoln Towing Service, Inc.*, 771 F.2d 189 (7th Cir. 1985); *Melara v. Kennedy*, 541 F.2d 802 (9th Cir. 1976). The mere invocation of state legal procedures does not constitute "joint participation" or "conspiracy" with state officials necessary to establish a cause of action under Section 1983. *Lugar*, 457 U.S. at 941, n.21.

In *Lugar*, the Supreme Court held that in the context of a pre-judgment attachment action a private party's joint participation with state officials in the seizure of the disputed property is sufficient to characterize that party as a "state actor." *Lugar*, 457 U.S. at 941. Unlike the case at bar, the defendant in *Lugar* filed an ex parte application for the prejudgment attachment of property. *Id.* at 925. A clerk of court issued the writ of attachment and the sheriff subsequently executed the writ. *Id.* Plaintiff's property was sequestered. *Id.* After a hearing thirty-four days later, the trial court dismissed the attachment because the statutory requirements had not been met. *Id.* The plaintiff brought a 42 U.S.C. Section 1983 action against the defendant alleging that in attaching his property, defendant had acted jointly with the state to deprive him of property without due process of law. *Id.* The

Supreme Court held that the plaintiff had stated a proper cause of action under 42 U.S.C. Section 1983 in the context of a pre-judgment attachment action. *Id.*

Here, Breedlove has established only that a Circuit Court clerk filed a Memorandum of Lien against property he no longer owned. He cannot meet the two-part test set forth in *Lugar* to show that he was deprived of any federally protected civil right or Tysons Manor HOA acted under color of state law. The facts of this case, even when construed in the light most favorable to Breedlove, simply do not support any allegation that respondents acted under color of state law.

Moreover, the facts of the present case are easily distinguishable from *Lugar v. Edmondson Oil Co.* First, Tysons Manor HOA did not seek pre-judgment attachment against any property owned by Breedlove. In fact, no property owned by Breedlove was ever attached, garnished, seized or sequestered. Thus, Breedlove was deprived of none of his federally protected rights. Second, Tysons Manor HOA did not act under color of state law by merely filing a Memorandum of Lien pursuant to Virginia Code §55-516 which was subsequently recorded by a clerk of court. Unlike the facts in *Lugar,* Tysons Manor HOA did not act jointly with the state to deprive Breedlove of his property without due process.

III. BREEDLOVE ERRONEOUSLY RELIES ON *COLEMAN V. THOMPSON,* 501 U.S. 722 (1991), FOR THE PROPOSITION THAT THE FOURTH CIRCUIT COURT OF APPEALS HAD TO SET FORTH WRITTEN DETERMINATIONS IN ITS ORDER AFFIRMING THE DISTRICT COURT'S RULING.

Breedlove cites *Coleman v. Thompson,* 501 U.S. 722 (1991), for the erroneous proposition that the Fourth

Circuit Court of Appeals was required to write an opinion on the reasons for which they affirmed the district court's ruling. The case of *Coleman v. Thompson* concerns the requirements necessary to dismiss a federal habeas corpus review for a state court procedural default. This case is simply not relevant, material, or controlling in this case. Moreover, the Fourth Circuit Court of Appeals clearly indicated that it found Breedlove's appeal without merit.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN A. HORVATH
(Counsel of Record)
JOHN D. MCGAVIN
MELISSA S. HOGUE
TRICHILO, BANCROFT, MCGAVIN,
HORVATH & JUDKINS, P.C.
4117 Chain Bridge Road, Suite 400
P.O. Box 22
Fairfax, Virginia 22030
(703) 385-1000

Counsel for Respondents

October 19, 1995

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

KENDALL H. BREEDLOVE, Plaintiff, -vs- TYSONS MANOR HOMEOWNERS ASSOCIATION, et al., Defendants.	C.A. No. 94-647-A

HEARING ON MOTIONS

September 9, 1994

Before: Claude M. Hilton, Judge

APPEARANCES:

Kendall H. Breedlove, Pro Se

Melissa S. Hogue, Counsel for the Defendants

[p. 2] THE CLERK: Civil action 94-647-A, Kendall H. Breedlove versus Tysons Manor Homeowners Association, et al. Are counsel present and ready, please?

MS. HOGUE: Good morning, Your Honor. My name is Melissa Hogue, and I am here on behalf of the defendants Tysons Manor Homeowners Association and Charlotte Schow.

We are here before the Court today on our motion to dismiss plaintiff's amended complaint pursuant to Rule 12(b)(6).

MR. BREEDLOVE: Your Honor, there are three motions noticed for today.

MS. HOGUE: That is correct, Your Honor. The plaintiff has two motions –

MR. BREEDLOVE: I would suggest that since one is a motion for extension of time to file affidavit pertaining to hearing a motion to dismiss and one is a motion that this Court publish its findings, I believe it would be appropriate to hear those motions first before Your Honor hears the motion to dismiss.

THE COURT: Well, it might be appropriate to hear the motion to extend time, and I will just listen to these other motions.

MS. HOGUE: Yes, sir, Your Honor.

THE COURT: Why do you need time to file an affidavit on a motion to dismiss?

[p. 3] MR. BREEDLOVE: Your Honor, at the time this was noticed my time was unfortunately heavily consumed with filing a major filing with the United States Supreme Court and with filing a written statement of facts with the Arlington County Circuit Court, the timing of which is driven by court rules that did not permit altering its timing.

THE COURT: Well, I can appreciate that, but what relevance would an affidavit have on a motion to

dismiss which just challenges the four corners of your complaint or your amended complaint?

MR. BREEDLOVE: As I understood, and perhaps I may have misunderstood, but as I understood the substance of this Court's Local Rule 11(m), the requirement set forth was that the party to the complaint file any relevant affidavits since the Court's hearing of a motion to dismiss was equivalent to a summary judgment proceeding.

THE COURT: Well, there is nothing in this motion that would be the equivalent of a summary judgment proceeding. I am not looking at any of the evidence. Her motions only go to what is stated in the four corners of your pleading.

I mean, this isn't a motion to the jurisdiction where I would look at some facts to ascertain whether or not there was jurisdiction, or it is not a summary judgment. They only attack the four corners of your pleadings, as I [p. 4] understand their motion.

MR. BREEDLOVE: That is why there was some confusion with the Local Rule and the notice which the opponent filed.

THE COURT: The Local Rule is there for the purpose of setting a time limit for you to file those items if they be relevant to the motion that is here. But I don't believe this motion to dismiss deals with anything other than what you have set out in your pleading. So, therefore, I couldn't look to the evidence or look to any affidavits. I have got to take – I have got to accept on their motion what you say in your affidavit as true. I mean, if

they want to get into the evidence, whatever you say in there I have got to accept as true. They just say taking everything you say, it still doesn't state a cause of action, as I understand their motion.

MR. BREEDLOVE: That would be my understanding of the motion as well, Your Honor.

THE COURT: All right. So, your motion to grant more time to file an affidavit will be denied, because I don't find an affidavit to be relevant to the issues before us.

As to publishing the opinion, I am not inclined to publish this opinion at all or even write an opinion. I have stated my reasons from the bench and you have those to pursue [p. 5] this manner in whatever manner you want to. I am not inclined to do any further writing on the case.

MR. BREEDLOVE: Then you are denying my motion to publish an opinion of this Court?

THE COURT: I am not even going to write an opinion. So, I don't have anything to publish.

MR. BREEDLOVE: All right. One other item, Your Honor. As I had to prepare the memorandum in opposition to the defendants' motion and that got into substantial discussion of the unconstitutionality allegations of the Virginia statute, I'm asking now whether under the provisions of 28 U.S.C. Section 2403(b), whether this Court can today hear this motion. That particular citation being the requirement that whenever a state statute is challenged, that the state's Attorney General be notified. And as yet I have not done that. And it

became questionable in my mind as I prepared that memorandum and the degree to which it was evident that this case has to challenge the state's Constitution, the law, the constitutionality of the state's law, it then seemed to me that perhaps that provision of the federal code was invoked. And without that notification to the Attorney General, I'm asking whether this Court can hear that question.

THE COURT: Well, let me go ahead and hear the motion and you can raise that in whatever argument you want [p. 6] in opposition to their motion.

MS. HOGUE: Thank you, Your Honor. As stated, we have filed another motion to dismiss the plaintiff's amended complaint. As this Court knows, we were before this Court on a motion to dismiss plaintiff's original complaint which this Court granted on July 8, 1994. It is still our position that the plaintiff has failed to state a claim for which relief can be granted. We submit the deficiency is still present and that there is no cure and, therefore, this case should be dismissed with prejudice.

I believe that the Court is familiar with the facts. And unless you would like me to, Your Honor, I will dispense with review of the facts.

THE COURT: You can do that.

MS. HOGUE: All right. There is two primary and compelling reasons why the amended complaint should be dismissed with prejudice, Your Honor. In order for an action under 42 U.S.C. Section 1983 to exist, defendants must have acted under color of state law.

Defendants are a homeowners association and its treasurer. They are not government officials, employees or agents of the government. Defendants are simply private individuals exercising its rights defined by Virginia Code. The defendants in this case, Your Honor, did no more than invoke a presumptively valid state lien procedure. Their [p. 7] essentially private conduct could not be fairly attributable to the state.

In this case the Fairfax County Clerk's ministerial function of reporting the lien upon defendants' invocation of the state legal procedures does not constitute joint participation or conspiracy with state officials satisfying Section 1983's requirement of acting under color of state law.

Additionally, Your Honor, we would still submit that there are adequate state remedies that are available to plaintiff in this case. And, therefore, he has not alleged a cause of action under Section 1983 as a matter of law which this Court can hear.

Thank you, Your Honor.

THE COURT: All right.

MR. BREEDLOVE: Addressing these points in perhaps reverse order. As to the availability of state remedies, Section 1983 does not require that state remedies be exhausted before invoking Section 1983 of the U.S. Code.

In point of fact, however, my litigation of a similar complaint in the Virginia courts has demonstrated that redress for a false or libelous or malicious lien are not available through the Virginia courts by causes of action

for common law defamation, statutory defamation, slander of title, malicious prosecution, abuse of process or civil [p. 8] conspiracy. And as a consequence of all of those actions being rather summarily turned out of court prior to ever reaching a jury, those are currently either pending appeal or on their way up the appeal ladder.

As a consequence of the personal experience, I can say that in Virginia there is no common law redress for a lien which is false or malicious or fraudulent.

Next. The defendants have alleged that they did no more than invoke a state statute for the Virginia property owners lien, which I believe is section, is Title 55 Section 516 of the Virginia Code. I presume from their assertion that they are saying they innocently invoked that statute. In point of fact, their argument is defective because they did not comply with the statute in a number of ways, but most particularly of importance at this time, since this is a question having to do largely with the denial of due process, the Virginia state statute requires a ten day prior notice before the lien attaches.

Had they complied in full with the Virginia statute, it seems they might at least, arguendo, be able to assert a defense that they were following the statute in good faith. In point of fact they did not follow the statute in good faith.

THE COURT: Well, if you have litigated that in the state court, why didn't you get that lien removed then if [p. 9] they didn't follow the statute?

MR. BREEDLOVE: Your Honor, under Virginia property owner association lien laws, there is no provision under the statutes to contest a lien in court.

THE COURT: Why didn't you file a petition to remove the lien?

MR. BREEDLOVE: While there is, for example, in the mechanic's lien statutes a provision to challenge the statute, there is not the similar provision under the property owner association law.

THE COURT: Well, why in the common law can't you petition to remove a lien that is improperly placed on you?

MR. BREEDLOVE: I am not prepared to be able to answer that question at this time, Your Honor.

THE COURT: I mean, you say that somebody put a lien on it, they didn't comply with the statute, with notice before they put it on. Well, that seems to me to be a pretty simple thing to remedy if that's in fact the case.

MR. BREEDLOVE: If I may, Your Honor, rather additionally. Although they liened property in my name, they did not lien my property. The property which they liened and which the case of *Wallace versus Brumback* indicates they would have the requirement to determine from the public records the ownership of the property which they proposed to lien, in fact they did not bother to determine from the court [p. 10] records, or, excuse me, from the public records, the public land records who owned the property. And they liened the property belonging to another owner. Also a rather major defect with the lien.

THE COURT: How do you manage to do that when you file a lien on – They just filed a lien in the land records. Did they put it on a specific piece of property?

MR. BREEDLOVE: Yes, sir, Your Honor.

THE COURT: All right.

MR. BREEDLOVE: The requirements for the lien are that it must cite the –

THE COURT: So, you really didn't have a lien? Somebody else had the lien?

MR. BREEDLOVE: Somebody else's title was clouded. In point of fact part of my allegations are that this infringed and invaded my liberty interest.

THE COURT: How would that be? If they didn't put a lien on you, they liened somebody else, he is the one that had the problem with the lien and not you.

MR. BREEDLOVE: When it is in your name, it affects you.

THE COURT: How did it affect you?

MR. BREEDLOVE: The effect is that that lien did at that time and continues to bear witness in the public land records, which are regularly searched by credit agencies, [p. 11] that I did not pay an alleged debt, had to be liened for it. The lien was subsequently satisfied by the subsequent owner of the property. And there is now remaining the appearance in the public records that I had to be liened for a debt which was then subsequently settled, compromised, satisfied. The witness that that bears is untrue.

The next item, I again point out that it is not necessary under Section 1983 to exhaust state remedies. They are written in the law as being available concurrently.

The arguments in *Lugar* and in some of the other cases dealing with similar subject matter raise the question typically in the dissent opinions as to whether or not a good faith defense should be available to a defendant under Section 1983. The courts have not currently stated a conclusion as to the specific availability of such good faith defense being offered, indicating that it would be an affirmative defense if it were to exist. It would be one which they would raise in their answer.

Their arguments are in essence that they are raising this good faith defense that they merely invoked a presumptively valid state statute. There being two major difficulties with that argument. One, which I have already touched on, is that they did not in good faith follow the statute. Okay. That in particular the due process, which the Supreme Court in *Mullane versus Central Hanover Bank* and [p. 12] its progeny has set forth as the minimum requirement of the Constitution, being notice and an opportunity to be heard, the notice portion of it, which has been incorporated in the state statute, they did not follow. And my allegations are that their actions are wanton, willful disregard of the rights of others, which is a part of malice.

THE COURT: Well, I understand that. The problem you have got is state action though. Where is the state action?

MR. BREEDLOVE: Yes, if I may, Your Honor. *Lugar versus Edmondson Oil Company* sets forth that in

circumstances of prejudgment attachment and the allegations of unconstitutionality of a state statute, that the only requirements for state action, for the defendants to be determined state actors is that they invoked the state law.

And the defendants' arguments parallel the arguments that were made by the respondent in *Lugar versus Edmondson Oil* which were first upheld by the District Court, next upheld by the Fourth Circuit Court of Appeals, but specifically and explicitly reversed by the United States Supreme Court with a particular note that the Fourth Circuit Court of Appeals was erroneous in its opinion.

And the Supreme Court said in *Lugar,* the Court of Appeals, that is from the Fourth Circuit, erred in holding that in this context joint participation required something [p. 13] more than invoking the aid of state officials to take advantage of state created attachment procedures. That holding is contrary to the conclusions we have reached as to the applicability of due process standards to such procedures. Whatever may be true in other contexts, this is sufficient when the state has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute. In summary, petitioner was deprived of his property through state action. Respondents were, therefore, acting under color of state law in participating in that deprivation.

If I may also, Your Honor, draw your attention to the Fifth Circuit *Folsom Investment Company, Incorporated versus Moore,* where the Court of Appeals said that the Supreme Court reversed the Fourth Circuit in *Lugar* and held that when a Section 1983 plaintiff challenges the

constitutionality of a state attachment procedure as opposed to making mere nonconstitutional allegations of misuse or abuse of the statute, the private party who sets that attachment scheme in motion is to be considered a state actor. Citations there.

So, insofar as Folsom and the Scullins have alleged that the Louisiana attachment scheme is violative of the Constitution, the private parties who set that scheme in motion acted under color of state law. And that's *Folsom* [p. 14] *versus Moore,* 681 F.2d 1032 at 1037, Fifth Circuit, 1982.

The Mississippi District Court, having quoted that exact paragraph in the case of *Lomax versus Davis,* went on to say the same is true of any state statute or procedure used by a private party to deprive an individual of his civil rights.

In my amended complaint I have alleged the unconstitutionality of the state statute. I have alleged that the lien was used for prejudgment attachment. And I stand ready by evidence to prove that allegation. I have alleged that the –

THE COURT: But they didn't attach anything. In fact, they didn't even get it on your property from what you tell me.

MR. BREEDLOVE: Your Honor, the question of whether or not a property or my property was attached is one of the questions of whether or not my civil rights have been violated. The others involve liberty interest, they involve the deprivation of due process, they involve the deprivation of equal protection under law. Whether

or not those occurred are questions of fact. And I would submit that to make any decision on them would be to invade the prerogatives of the jury to determine questions of fact.

I believe that it is appropriate that this case proceed forward toward jury trial, that it may be tried [p. 15] before a jury and the results to come forth as they may.

THE COURT: All right. Well, I understand your position, but I believe, Mr. Breedlove, that your reliance on *Lugar* and those cases decided under it is a bit misplaced. This simple recording of a lien, which is a ministerial act required by law for the clerk to do, just simply isn't the state action that *Lugar* is talking about.

And I find that there is still no state action alleged in this amended complaint. I am going to grant the defendants' motion to dismiss. However, any state claims which may be stated in this complaint will be dismissed without prejudice and you are free to pursue whatever constitutional challenges or whatever actions you may have in the state courts to deal with the problem. They will be dismissed without prejudice.

MS. HOGUE: Thank you, Your Honor.

MR. BREEDLOVE: Thank you, Your Honor.

MS. HOGUE: Your Honor, is there a time limitation if Mr. Breedlove decides to pursue any state claims he feels he has?

THE COURT: Only the statute of limitations as far as I know or whatever else may – I wouldn't hazard a guess as to what limitations there may be, but I am not

going to place any limitations on whatever actions he wants to.

MS. HOGUE: Thank you, Your Honor.

[p. 16] MR. BREEDLOVE: Thank you, Your Honor.

THE COURT: All right. If that concludes our docket, we will adjourn until Monday morning at 9 o'clock.

HEARING CONCLUDED

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

COPY

Norman B. Linnell, CP, CM, CE